In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

Nos. 06-3517 and 06-3528

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAWRENCE E. WARNER, and
GEORGE H. RYAN, SR.

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 02 CR 506 — Rebecca R. Pallmeyer, *Judge*.

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

The jurisdictional statement of the defendants-appellants is complete and correct.

ISSUES PRESENTED

1. Whether the district court abused its discretion when it disqualified two jurors during deliberations and replaced them with alternates.

2. Whether the district court abused its discretion when it concluded that there was no reasonable possibility that extraneous information prejudiced the jury.

3. Whether the district court abused its discretion in excluding certain evidence at trial.

4. Whether the district court erred in refusing to dismiss Count One of the indictment prior to trial.

5. Whether the district court erred in instructing the jury on the RICO charge in the indictment.

6. Whether the mail fraud statute is unconstitutionally vague.

7. Whether the district court abused its discretion in denying Warner's motion for severance.

8. Whether the grand-jury testimony of the chief legal counsel of the Secretary of State's office violated the attorney-client privilege.

STATEMENT OF THE CASE

In December 2003, in a second superseding indictment, a federal grand jury indicted appellants for racketeering conspiracy and mail fraud. R110(JA228-318).[1] Ryan was also charged with making false statements to the FBI, obstructing and impeding the IRS, and filing false tax returns; Warner was charged with attempted extortion, money laundering, and structuring a financial transaction. *Id.*

Following a trial that began September 19, 2005, R329, the jury returned a verdict of guilty on all counts on April 17, 2006. R770,771.

The district court granted defendants' motions for acquittal on Counts Nine and Ten, R867:20-23(JA20-23), but otherwise denied their motions for acquittal and new trial. On September 6, 2006, the district court sentenced Ryan to 78 months in prison. R888. Warner received a sentence of 41 months' imprisonment. R887.

Each defendant timely appealed.

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[1]Citations to appellants' brief are noted as "Br___" and to record documents as "R__." Citations to trial transcripts are noted as "Tr__" followed, if applicable, by the joint appendix citation ("JA__"). Other transcripts are cited by date of the proceeding ("5/5/06Tr__"). Government exhibits are cited as "Gx__." Citations are to the available transcripts; the official transcript of proceedings has not yet been transmitted. Br1n.1

STATEMENT OF FACTS REGARDING OFFENSE CONDUCT[2]

The government's evidence proved Ryan engaged in a scheme to defraud Illinois taxpayers, and Warner joined in the scheme. While steering government leases and contracts to Warner and others, Ryan, his friends, and his family repeatedly reaped valuable financial benefits that influenced him in his governmental decision-making process. The government offered testimony from over 80 witnesses and reams of documents as evidence of appellants' guilt. The evidence showed Ryan repeatedly concealed his participation in the scheme, even lying to law enforcement, and Warner did likewise, using nominees, structuring financial transactions, and engaging in other third-party transactions.

Background

In November 1990, George Ryan, then Illinois Lieutenant Governor (LG), was elected Illinois Secretary of State (SOS); he was reelected in 1994. Tr2735-36. As SOS, Ryan was obligated to file annually a statement of economic interest disclosing certain gifts and financial benefits and was otherwise prohibited from accepting things of value from people doing business with the SOS office. Tr2884-90;Gx28-012,01-020.

The SOS office had approximately 4000 employees and twenty departments. Tr2739-43,8032. From 1993 to 1998, directors of the largest SOS departments reported to chief of staff Scott Fawell, a close Ryan associate and top campaign aide. Tr2739-40.

[2]We discuss the facts surrounding the jury issues in arguments I and II below.

Throughout Ryan's tenure as SOS, Warner and Ryan were "best friends" and spent much time socializing and vacationing together. Tr2750-52,2878-80,3405-16. Warner and Ryan talked daily, and Warner enjoyed virtually unlimited access to Ryan and the SOS office. Tr2750,2759-63. As incoming SOS, Ryan appointed Warner to the SOS transition team, a group that reviewed SOS operations and made recommendations. Tr2738-39,2749. As of 1991, when Ryan became SOS, Warner was an insurance adjustor, Tr2753; he was not a lobbyist or government consultant and did no business with any state agency.

While Ryan was SOS, Warner, along with long-time Ryan friends Donald Udstuen and Arthur Swanson, were members of Ryan's "kitchen cabinet," a core group of unpaid advisors. Tr2757,8040-41. Ryan named Udstuen, the chief lobbyist of the Illinois State Medical Society (ISMS), as co-chair of the SOS transition team. Tr2758-59,3108. Swanson, who had served as a legislator with Ryan, operated a lobbying firm and also had unlimited access to Ryan and the SOS office. Tr2891,2925-26.

In November 1998, Ryan was elected Governor. Tr2709. As in 1990 and 1994, Ryan's campaign was conducted through Citizens For Ryan (CFR), and Fawell was a top campaign operative. Tr2708-11. After becoming Governor, Ryan appointed Fawell as CEO of the Metropolitan Pier & Exposition Authority (MPEA), the highest paid state position. Tr2712-13.[3]

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[3]In the spring of 2003, Fawell was convicted for diversion of SOS assets and resources to benefit CFR. Tr2713-14. Fawell was reindicted in 2004 for fraudulent conduct while at MPEA. Tr2714. Fawell pled guilty and reluctantly agreed to testify for the government in this case. Tr2716;Gx01-059.

The close and corrupt relationship between Ryan and Fawell began in 1988, when Ryan secured Fawell a personal services contract with the LG's office paying Fawell $11,000 although he did no government work. Tr2725-32;Gx01-001,01-057. Subsequently, as LG and SOS, Ryan appointed Fawell to top positions in government and CFR. Tr2708-11,2736-40. Fawell always reported directly to Ryan, and as chief of staff, conversed with him daily. Tr2709-11,2721. Ryan and Fawell also frequently socialized together, including attending sporting events and vacationing, often with Warner. Tr2721,3405-23.

SOS Leases and Contracts Steered to Ryan Friends and Benefactors

It was SOS policy under Ryan to pursue competition for SOS contracts and leases. Tr6004,6145-49,18100-101. Major SOS contracts were to be awarded after competitive bidding, with reviews and recommendations by SOS staff (Tr8035-36), while the leasing process was designed to be a "bottoms up" process whereby SOS staff would "recommend" leases to Ryan's office after alternative sites were considered. Tr2872-73,6144-50;Gx11-013. Ryan, however, intervened to steer contracts and leases to friends from whom he and his family received financial benefits.

The ADM Validation Stickers Contract

Shortly after Ryan's election as SOS, Warner told Udstuen he was going to capitalize on his relationship with Ryan by entering the lobbying business. Tr11620. Warner said Udstuen should be part of this effort because no one had done more for Ryan than Udstuen. *Id*. Udstuen wanted to ensure that Ryan had approved Warner's plan involving Udstuen. *Id*. Warner said he had talked to Ryan, Ryan was aware of

it and "fine" with it. Tr11620-21. Warner added, "I will take care of George." Tr11622. Udstuen stated that he could not be the front person, and he told Warner that Alan Drazek, an Udstuen friend, would help conceal Udstuen's portion of the proceeds by allowing Drazek's company, American Management Resources (AMR), to be used as a conduit. Tr11623-28,11649-59.

One of the Warner-Udstuen team's first clients was ADM, a manufacturer of validation stickers for license plates. Tr11637. Prior to Ryan becoming SOS, ADM had won the annual stickers contract, which contract had specifications calling for a "metallic security mark," a specific anti-counterfeiting feature that only ADM could provide (other vendors had different security marks). Tr8032-33,8064,8067-68,8112-13. These specifications effectively made this a sole source contract. Tr2797. From 1991 through 1998, through changes of ownership in ADM, Warner regularly solicited ADM officials, insisting that they would lose the stickers contract if they did not pay him a fee because Warner would use his relationship with Ryan to cause the specifications to be "opened." Tr8664-69,9332-36,9159-65. Each ADM owner paid Warner a monthly amount, ranging from $2,000 to $5,000, to keep the stickers contract. Gx02-004,02-005,02-015,02-500,02-501.

The stickers contract was let through an SOS division headed by James Covert. Tr2744,8032-33. In early 1991, Warner told Covert that Warner had authority to speak for Ryan.[4] Tr8053. In early 1993, in light of complaints from other sticker

[4]At one point, Covert told Ryan that Warner might get Ryan in trouble because of his meddling in SOS business. Tr8110. Ryan responded, "Warner is your friend"

vendors, Covert decided to "open up" the specifications by eliminating the metallic security mark. Tr8120-26,8135-36. When Warner learned of Covert's decision, an upset Warner told Covert that he would "take care of it." Tr8140-44. A day or two later, a stern Ryan told Covert to quietly retract the revised specifications. Tr8143-46. The metallic security mark specification thus remained, and ADM continued to be awarded the stickers contract. Tr2801,8146-47.

From 1991 to 1999, Warner received $399,000 from ADM; Warner funneled $122,000 through AMR to Udstuen, who did nothing to assist ADM. Tr16905,16916;Gx02-500,02-501.

The IBM Mainframe Computer Contract

Another client landed by Warner and Udstuen was IBM. Tr11642-45. Initially, Warner and Udstuen unsuccessfully solicited IBM's competitor, Honeywell, which in 1991 held the SOS mainframe computer contract. Tr3107,11631,11665. They asked Honeywell for a large fee to keep the mainframe contract. Tr11632. When Honeywell expressed reservations, Warner and Udstuen referred Honeywell to Swanson, who offered to land the contract for an even larger fee. *Id.* Troubled over solicitations by individuals so close to Ryan, Robert Cook, a Honeywell lobbyist and friend of Ryan's, met with Ryan. Tr5875-90. Ryan denied any awareness of the solicitations and committed to investigate the matter. *Id.* The next day, Ryan told Cook things were not as Cook had alleged and he considered the matter settled. Gx04-003;Tr5889.

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and is "just a businessman trying to do business," and directed Covert to return his calls. Tr8110.

Shortly after the Cook meeting, Ryan chose Warner and Udstuen to search for a director of the SOS department that dealt with mainframe computer issues. Tr12526. Warner and Udstuen recommended Frank Cavallaro, who they knew would support a transition to IBM, and Ryan hired Cavallaro. Tr12528-29. When in 1996 Cavallaro put the mainframe contract to bid, IBM was awarded the $26 million contract. Tr3125,12541;Gx04–043.

Warner, who first entered into a lobbying contract with IBM in 1993, received almost $1 million from IBM, most of which came as a result of the award of the mainframe contract. Tr12981-87; GX04-014,04-021. Warner funneled $298,371 through AMR to Udstuen, and Udstuen's interest was never disclosed to IBM or on lobbyist disclosure documents. Tr16918,16923;Gx04-500,04-501.

The Viisage Digital Licensing Contract

In July 1996, when the SOS office was considering switching to digital driver's licenses, several companies, including a Unisys joint venture and a company called Viisage, made presentations to Ryan regarding their capabilities. Tr3091-94. Unisys' lobbyist was Fawell's close friend Al Ronan. Tr3094-95. Ryan informed Ronan that Ronan and his wife (a Unisys executive) were not on the "right horse," and that Ronan's wife should contact Warner. Tr13140.

Shortly after the presentations, Warner entered into an arrangement with Viisage in which he would receive 5% of Viisage's revenues on the licensing contract, in return for his help in landing it. Gx03-015,03-016. Keeping himself behind the

scenes, he made Irwin Jann, a registered lobbyist, the front person who would receive the Viisage fees and provide two-thirds of the total to Warner. Tr13206;Gx03-020.

In December 1996, months *before* the bidding process for the contract began, Warner, at Ryan's direction, cut Swanson in on his Viisage deal, guaranteeing Swanson $36,000 for his "lobbying efforts." Tr3102-04;Gx03-009. After Viisage was awarded the contract, Warner received $834,000, of which he provided Swanson $36,000, as Ryan had directed, even though Swanson never performed any services for Viisage. Tr3103-04,16923-25;Gx03-500,03-501. Neither Warner nor Swanson ever registered as a lobbyist for Viisage. Gx03-023.

The Bellwood and Joliet Leases

Ryan steered two SOS leases to Warner in a "top down" process. Relating to the Bellwood lease, Warner told Fawell and Ryan that he found a location to house the SOS Police. Tr2772-73. When Fawell expressed concern that the press might discover Warner's involvement, Warner told Ryan and Fawell not to worry because Warner's ownership interest was "buried in the paperwork." Tr2774. Ryan approved the Bellwood lease, with Warner's concealed interest, and Warner received approximately $171,000 in profits. Tr16954;Gx07–011,07-500,07-501,07-502.

In about 1994, Warner told Ryan that Warner was looking for property in Joliet to lease to the SOS. Tr7822-24. Ryan directed an SOS official to deal with Warner on the lease. Tr2804-05,10463. Warner first pursued purchasing a property in the name of his secretary, but, after that fell through, he purchased a second Joliet property. Tr10461-63. As to the second property, Warner told Fawell that Warner's ownership

was buried in paperwork and that a man named Purze would be on the lease. Tr2812,3005;Gx06-500. Warner even directed his real estate attorney to leave his name off any external correspondence. Gx08-035. Within three months of Warner purchasing the property for $200,000, Ryan authorized and signed a four-year SOS lease, through which Warner received $854,258. Gx06-016,06-028,06-501,06-502. When Warner's role in the lease came to light publicly, Warner told Udstuen that he never should have done the Joliet lease because it was "too good a deal." Tr11727.

In his October 2000 FBI interview, Ryan falsely stated he never discussed with Warner his interest in the Joliet lease and had no personal knowledge of Warner profiting from the lease. Tr18154-55. Ryan stated he had no idea how Warner could have had advance knowledge of the Joliet lease and denied giving advance information to Warner regarding SOS office leases. *Id*.

The South Holland Lease

Beginning in the 1990s, Ryan and Fawell made trips to a Jamaican villa owned by Harry Klein, a currency-exchange owner they recently met. Tr2832-34,9421-23;Gx01-044. On Fawell's first trip, Ryan said that because the SOS regulated currency-exchange fees, they should each give Klein a check for the $1,000 lodging fee, but Ryan said that Klein would give them back the same amount in cash. Tr2838-42. That is in fact what happened each year from 1993 to 2001. Tr2844,9432-33;Gx10-001-10-009.[5] Ryan never disclosed the gifts from Klein on his disclosure forms. Gx28-012.

[5]Throughout Ryan's first SOS term, currency exchanges had requested a fee increase, and Ryan had opposed it. Tr2843-44. In January 1995, in Jamaica, Klein

In late 1996 or early 1997, after favoring Ryan and Fawell with lodging at his villa for years (as well as free lodging in California), Tr2845-49,18162, Klein told Ryan that he wished to lease his building in South Holland to the SOS. Tr2858-59. Ryan told Michael Chamness, an SOS director, to work out a lease for the Klein property. Tr6552. Without reviewing other sites, Chamness cancelled a less-expensive lease at another facility to move to Klein's property. Tr3010-11,6557-6560;Gx01-062. When Chamness asked Ryan's view about certain disputed lease terms, Ryan responded, "What does Harry want?" and then approved Klein's terms. Tr6578-80;Gx01-006. Ryan told Fawell he wanted "Harry to be happy" with the lease terms. Tr2870. In June 1997, Ryan signed the South Holland lease, authorizing $600,000 in payments to Klein over a five-year period. Gx11-001.

In a January 2000 FBI interview, Ryan falsely stated that he paid his own expenses, including a $1,000 lodging fee, at Klein's villa. Tr18102-03. After the interview, Ryan's attorneys produced negotiated checks reflecting annual lodging payments. Tr18143-49;Gx10-013. Ryan never disclosed the cash-back arrangement. Tr18149.

Lincoln Towers Lease

In early 1995, around the time Ryan received a complimentary vacation at a Swanson-owned timeshare in Mexico (Tr15261-71;Gx34-004), Ryan steered an SOS Springfield lease to Swanson. Tr2910-20. Ryan told Fawell to work out the Swanson

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asked Ryan to approve a fee increase. Tr2851. Ryan and Fawell subsequently agreed. Tr2852-53.

lease, even after Swanson proposed a rental figure well above market rate. Tr2914-16. By including non-useable space in the cost figures, Fawell manipulated the cost per square foot of the Swanson lease to make it lower. Tr2919;Gx01-036. Signed in April 1995, the SOS lease at Lincoln Towers cost the SOS $97,000 more than its former location. Gx15-027,16-002,01-036. Swanson earned over $21,000 on the deal. Tr15345(JA885);Gx15-029.

Additional Contracts Steered To Swanson

After Ryan named Fawell CEO of MPEA, he told Fawell to hire Swanson as an MPEA lobbyist. Tr2929-30(JA791). (This was a short time after Swanson paid $2,200 for Ryan's daughter to take a family trip to Disneyworld. Tr1665-66;Gx28-009.) However, Fawell already had a lobbying firm (Mayer, Brown & Platt), was not looking for an additional lobbyist, and did not respect Swanson's lobbying abilities. Tr2927-33(JA791). When, after several weeks, Fawell had not hired Swanson, an agitated Ryan repeated his directive, adding that Swanson should receive $5,000 per month. Tr2934. Fawell then hired Swanson on Ryan's terms, engaging him as a sub-lobbyist to Mayer Brown to avoid a public bidding process. Tr2937-38. Swanson's firm did virtually no meaningful work, yet the Ryan-authorized arrangement continued for three years, with Swanson receiving $180,000 in fees. Tr17238;Gx16-503.

As Governor, Ryan, in consultation with Udstuen, approved Swanson as a lobbyist for a Wisconsin utility seeking Illinois business. Tr11718-22. Thanking Udstuen for the referral, Swanson gave him $4,000 in cash in the men's bathroom of a Chicago restaurant. Tr11722. After receiving the cash, Udstuen told Swanson:

"Well, George really picked you," to which Swanson replied "I know, but you were helpful . . . and I always take care of George." *Id.*

Financial Benefits to Ryan, His Family, and Friends

While Ryan performed official acts benefitting Warner and Swanson, they provided benefits to Ryan, his close friends, and his family, none of which were disclosed by Ryan. Gx28-012. Warner provided (a) over $400,000 in payments to Udstuen relating to ADM and IBM; (b) $145,000 in loans and financial support to Comguard, a financially unstable company partly owned by Ryan's brother, Gx09-001,09-002,09-020,09-500; (c) $36,000 to Swanson relating to Viisage; (d) approximately $25,000 in loans, gifts, insurance services, investments and payments to Ryan and his family, *e.g.*,Gx08-087,08-088,08-089,22-004; and (e) over $250,000 to CFR, Tr3126-30;Gx28-069,28-072.

Swanson provided vacation benefits to Ryan (*e.g.,* Tr15261-71;Gx16-077-79) and his daughter (Gx28-009), and gifts to Ryan and his wife (*e.g.*, Gx16-029,16-040,16-041,16-042,16-044,16-045,16-046,16-050,16-071).

Ryan's Use of Cash

As SOS, Ryan always carried "quite a bit" of cash in his pocket. Tr2943-44. He regularly made cash expenditures—for everyday items, as well as frequent casino gambling trips, "generous" tips, dry cleaning and gifts to his children—but never went to a bank or ATM to obtain cash. Tr2945-51,3001-02,7844-46,7860. Ryan and his wife's joint bank account showed limited cash withdrawals—on average $670 per year

over ten years. Gx33-500,33-501. In 1997, the Ryans withdrew a total of $77 in cash. Gx33-500,33-501,33-504.[6]

Swanson and Warner, though, withdrew large sums of cash. Gx16-089,08-510. Swanson regularly withdrew thousands of dollars in cash, sometimes shortly before calendared meetings with Ryan. Gx16-089. Over six years, Warner made twelve withdrawals of $9,000 or more each. Gx08-510. In early August 1997, Warner made two cash withdrawals from the same bank, each at a different branch—one for $9,000 and one for $5,000. Tr17231;Gx08-039. Warner was a bank director at the time and knew of currency-transaction reporting requirements. Tr12485-93;Gx08-079,08-080.

CFR Fundraising and IG Department Investigations

CFR raised millions of dollars. Tr3305-06. While these funds were used mainly for campaign expenditures, CFR also paid certain personal expenses of Ryan, including frequent restaurant tabs, vacation travel, and substantial gifts to family members. Tr3306,17406-10. Ryan closely managed CFR funds; he rebuffed others' efforts to control the funds. Tr3470,11700-703.[7]

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[6]On Ryan's behalf, his secretary collected cash gifts every Christmas from state employees—executive staff as well as secretaries and janitors. Tr18648-68. Ryan kept track of the donors and the amounts contributed. Tr18660;Gx27-021. Ryan never returned any of the cash. Tr18653.

[7]It was permissible for Ryan to convert campaign funds to personal use, but he was required to disclose and pay income taxes on all funds converted. Gx24-003,24-006. Ryan's undisclosed conversion of $55,000 given to his son-in-law and disguised as "consulting" payments formed the basis for the tax charges. Tr17070-79;Gx22-003.

Beginning in 1992, CFR sponsored annual fundraisers, including two SOS employee events that generated up to $700,000 per year. Tr 3302-04. Supervisory SOS employees distributed event tickets to lower level SOS employees, and ticket sales were monitored by higher-ups. *Id.* For several years Ryan honored SOS employees who sold large numbers of these $100 tickets. Tr3496-500;Gx01-015. One such honoree was Marion Seibel, who sold $80,000 in tickets while supervising the issuance of truck licenses (CDLs) at her SOS facility. Tr16656-58.

As SOS, Ryan appointed Dean Bauer, a long-time friend, to head the IG Department, which conducted internal investigations. Tr3502-03,18112. Ryan was personally notified of IG investigations of wrongdoing by SOS employees linked to CFR fundraising: a March 1993 investigation of the sale of licenses by a Libertyville SOS supervisor (Tr 3503-10(JA814),14526-28,), a March 1994 investigation of ticket sales to a car business regulated by the SOS (Tr14533-35,3510-11), and an April 1994 investigation of theft of SOS funds in Naperville (Tr14535-53;Gx01-048).

In 1994, Seibel was under investigation for selling CDLs. Tr14556-63. In November 1994, when an IG agent (Russell Sonneveld) learned that a truck driver involved in a fatal accident had obtained his license from Seibel, Sonneveld requested permission to open a case and travel to Wisconsin to interview the driver. Tr14570-71;Gx38-002,38-007. Bauer rejected the requests. Tr14571. Nevertheless, Bauer told another SOS law enforcement official that he was "actively pursuing a case" on the driver. Gx38-001. No such case was opened or pursued. Tr16101-103.

One month later, in December 1994, Fawell proposed that Ryan reorganize the SOS office, including the IG Department. Tr3517-18;Gx01-019. Fawell, recommending that Ryan "start over" with the department and get rid of "freelancing," wrote: "let's get someone in there who won't screw our friends, *won't ask about FR [fundraising] tickets* and who will run a no nonsense shop. . . ." Gx01-019 (emphasis added). Subsequently, Ryan authorized the termination and reassignment of IG agents, like Sonneveld, who were "trouble." Tr14179-80;Gx01-030.

In April 1998, in the wake of media inquiry regarding the IG Department's investigation into the Wisconsin fatal incident, Ryan publicly stated that all IG investigations were thorough. Gx17-0100.

Low-Digit Plates Issued by Ryan

The SOS Office issued low-digit license plates—those with four or fewer numbers or letters. Tr3585-86. Low-digit plates were not available to the general public; Ryan himself authorized their issuance. Tr3590-93;Gx01-033. Warner received a number of low-digit plates from Ryan (Tr3596-97), as did Anthony DeSantis, a local businessman. Tr6914-15. In August 1997, DeSantis told Ryan that he wanted to contribute $2,000 to Ryan's gubernatorial campaign but did not want to be disclosed on publicly-available campaign reports. Tr6897. Ryan told DeSantis to make four checks of $500, payable to each of four Ryan family members (Ryan, his wife, his son, and his daughter-in-law). Tr 6906;Gx19-003-006. DeSantis sent the checks as directed, and sent two more checks, one in December 1997 for $500 and one in December 1998 for $1000. DeSantis explained that Ryan was "good to him," it was

Christmastime, and he received low-digit plates. Tr6915;Gx19-007,19-008,19-009. In fact, after sending the $1000 in 1998, Ryan's SOS secretary offered DeSantis a low-digit plate. Tr6920.

Ryan did not disclose the DeSantis payments on his disclosure statements until after the FBI asked Ryan about his relationship with DeSantis. Tr18163-66;Gx28-012,28-024. In his February 2001 FBI interview, Ryan falsely denied giving DeSantis specific information from which DeSantis wrote the 1997 checks to Ryan's family. Tr18169-70.

Ryan's Participation in the Diversion of State Assets and Resources

From 1988 through 1998, Ryan, acting through Fawell, diverted state assets and resources to benefit his 1990, 1994 and 1998 campaigns, as well as several others. In the 1995 campaign for president by Texas Senator Phil Gramm, Ryan, using AMR as a conduit, also received undisclosed payments, disguised as "consulting fees," for his family members upon his endorsement of Gramm. Tr3731-44,17251-53;Gx17-500,. Fawell received concealed fees as well. Gx17-500. Senator Gramm and his top aide both testified they were unaware "consulting fees" were going to Ryan and would not have approved payments to an elected official who had endorsed Gramm. Tr8922-24,8773-74.

SUMMARY OF THE ARGUMENT

The appellants' use of hyperbole, like 'avalanche of errors,' (Br17) cannot overcome the record here, a record demonstrating throughout the court's utmost

caution to safeguard and respect defendants' trial rights, through and including the jury deliberations.

1. After a six-month trial, the district court properly exercised its discretion to replace two jurors with alternates during deliberations. Acting with superlative care, the court made findings of fact that those two jurors, Pavlick and Ezell, and no others, had been dishonest in *voir dire* when honest answers would have provided cause for dismissal. The court applied a consistent standard to jurors regarding their answers in *voir dire*—that supplied by *McDonough Power Equipment v. Greenwood*, 464 U.S. 548 (1984)—and found that no other jurors met the standard for dismissal. Moreover, Pavlick and Ezell met appellants' proposed standard for dismissal—giving "untruthful" answers in *voir dire*—which led to appellants' agreement to their removal, and thus their waiver of the issue.

2. The court did not dismiss Ezell for her views of the evidence—as the court found, her views were unknown to the court and the parties at the time she was dismissed. Given that Pavlick was dismissed along with Ezell—and the court's instructions that neither juror was excused for their views—the jury could not have thought that certain views of the evidence would lead to dismissal.

3. The court meticulously ensured that the alternates had not been exposed to media coverage or other extraneous influences, and instructed the reconstituted jury to start deliberations anew. The court individually questioned jurors to ensure they would disregard what had taken place before and start over with the substitutes. After substitution, and exhaustive individual as well as group instructions, the jury

deliberated for ten days before returning a verdict. Thus the appellants cannot show prejudice by the substitution.

The court found as fact that before substitution, the jury had been exposed to one item of extraneous material: a paragraph regarding the basis for substitution of a juror who is unwilling or unable to deliberate. The court concluded that the material did not concern defendants or the evidence. The material was consistent with the court's instructions and clearly did not burden the expression of jurors' views. Given the jury's behavior, the instructions to restart deliberations, and the strength of the evidence, the district court properly exercised its discretion in concluding that there was no reasonable possibility that this material prejudiced the jury.

4. The court properly excluded evidence offered by Ryan concerning the actions of his successor in office as irrelevant on the issue of Ryan's good faith. The court did allow Ryan to introduce evidence to show that his actions were consistent with those of his predecessor. The court properly excluded evidence offered on the substance of Ryan's policies, including the hot-button issue of death-penalty reform.

5. The State of Illinois was properly named as the RICO enterprise in Count One. The RICO statute defines "enterprise" to include any legal entity, and public entities have long been named as enterprises. The court did not direct a verdict by instructing that a state is a legal entity.

6. The mail-fraud statute is not unconstitutionally vague, and the instructions correctly covered the elements of honest-services mail fraud.

7. The indictment properly joined Ryan and Warner—both were charged in the RICO conspiracy and mail-fraud scheme. All other counts related to the conspiracy and scheme. Appellants were properly tried together, since the bulk of the evidence pertained to both and the court gave limiting instructions where appropriate.

8. The grand jury testimony of the SOS general counsel, who did not testify at trial, was proper and did not prejudice appellants.

ARGUMENT

I. The District Court Properly Dismissed Two Jurors and Replaced Them with Alternates.

A. Standard of Review

A decision to replace a juror with an alternate is reviewed for abuse of discretion, *United States v. Doerr*, 886 F.2d 944, 970-71 (7th Cir. 1989), which exists "only where no reasonable person would agree with the decision of the trial court." *United States v. Mitov*, 460 F.3d 901, 909 (7th Cir. 2006).

Findings of fact are reviewed for clear error, which exists only when the reviewing court holds a "definite and firm conviction that a mistake has been made." *United States v. Huerta*, 239 F.3d 865, 871 (7th Cir. 2001).

Denial of a motion for mistrial is reviewed for abuse of discretion. *United States v. Davis*, 15 F.3d 1393, 1399 (7th Cir. 1994).

B. Background

1. Jury Selection and Jury Issues During Trial

Prior to trial, 301 prospective jurors filled out a lengthy questionnaire. *See* R305(JA320). The *voir dire* of prospective jurors took six days, Tr3-2305, and involved questions by the court and the parties' lawyers. Tr383,782-83.

During *voir dire*, questions arose about the criminal background of prospective juror Talbot, who disclosed a 1970s-era burglary conviction. Tr1592-93,2166. The government, explaining it had not conducted background checks of any jurors, requested and received court permission to check Talbot's criminal history. Tr1918-19,2166. After obtaining his criminal history, the government shared it at sidebar. The burglary incident had not resulted in conviction, but Talbot did have an undisclosed 1976 arrest for cannabis, criminal damage to property, and resisting a peace officer, with a conviction and conditional discharge on the cannabis charge. Tr2280-81. Ryan's counsel commented that Talbot reported one conviction, and offered that Talbot perhaps did not realize a conditional discharge on the cannabis charge was a conviction. Tr2281. No party moved to strike Talbot, criticized him for not reporting his cannabis arrest, or questioned his honesty, and Talbot was seated as a juror.

After the jury was chosen and before opening statements were completed, the government, at sidebar, pointed out that the court had seated eight alternates instead of six and asked if the defense objected. Tr2499. Neither defendant objected. *Id.*

Early in the trial, three jurors were dismissed for reasons not involving any misconduct.[8] Beginning in January 2006, through its own observations, those of the

[8]Tr2685-95,3135-38,3202-03,3831-38,4051-57,4060-83.

parties, and communications from jurors, the court became aware of Juror McFadden sleeping during trial.[9] On February 13, the court noted, "I am concerned about the possibility that somebody is going to be deliberating who has missed significant portions of the testimony . . . ." Tr19870. A week later, the court, with counsel present, spoke to McFadden and learned she recently was diagnosed with diabetes, was experiencing variations in her blood sugar that caused drowsiness, and was not taking medication to control her blood sugar. Tr21009-12. The court then dismissed her. Tr21016, 21579.[10]

2. Jury Issues During Deliberations of the Original Jury

a. Notes from the Jury

On March 10, closing arguments concluded and the jury was instructed. Tr23871-940. Deliberations began on Monday, March 13, Tr23944, and continued through Thursday. During that week, the jury asked for a law dictionary, Tr23968, a projector, Tr23974, a witness list, *id*., transcripts of five witnesses' testimony, Tr23982(JA379), and guidance on what exhibits to consider in relation to Count 14 and on the *Pinkerton* instruction, Tr24022,24030-46(JA390,392-96). After short discussions with counsel, the court responded to each request. On Monday morning, March 20,

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[9]*See* Tr15082 (court observed McFadden nodding off),19589(court observed McFadden "completely asleep"),20047(court observed McFadden asleep for five minutes); *see also* Tr15237,17285,19866,20045-47.

[10]Before closing arguments, another juror was dismissed after Warner's counsel saw him reading newspapers containing articles about the trial. Tr17639-45,20260-64,20267,21339-42,21634-37.

Juror Evelyn Ezell sent the court a note, also signed by the foreperson, complaining that other jurors were calling her derogatory names and shouting profanities. Tr24053(JA399). After conferring with counsel, the court responded with a note asking the jurors to treat one another "with dignity and respect." Tr24055(JA399).

Two days later, the court received a note from Juror Losacco signed by seven other jurors, including Juror Pavlick. The note asked if Ezell could be excused and replaced with an alternate based on her antagonistic approach, refusal to engage in meaningful discourse with other jurors, and physical aggression. Tr24074-75(JA405). In formulating a response, the court made the following observation: "[Losacco] has not told us anything about the way the jury stands on the merits. She really has not. So she has not disclosed anything about the conclusions they have reached, if any." Tr24097(JA411). Defense counsel did not disagree. (Several days later, the court similarly observed: "Ms. Losacco's note . . . said nothing about whose side anybody was on." Tr24582(JA534).)

On March 23, the court responded to the jury, stating that jurors should treat each other with dignity and respect and reminding them of their duties. R802:Exh1. At the request of the defense, to assure Ezell she would not be pushed off the jury, the response began: "You twelve are the jurors selected to decide this case." *Id.*

b. Interviews of Jurors Regarding Answers on Questionnaires

Shortly after responding to that note, the court learned the Chicago Tribune had discovered that Pavlick had a DUI conviction, which he had not disclosed in answer to question #82 on the jury questionnaire (asking if the juror or any close friend or family

member had ever been charged with or accused of a crime). Tr24210-13(JA439-40).

At the suggestion of Warner's counsel, the court asked the government to check Pavlick's criminal history. Tr24214(JA440). While discussing the results of that check, the court and parties learned the Tribune was also looking at jurors Ezell and Gomilla. Tr24233-34(JA445). At the court's direction, the government checked their criminal backgrounds as well. Tr24243,24270(JA447,454).

Pavlick's background check revealed a felony DUI conviction and a misdemeanor reckless conduct conviction. Tr24224,24227,24240,24274-75,24288-91,24365(JA443,447,455,459-60,479). The court dismissed the jury at 2:30 p.m. and questioned Pavlick about his criminal history. Tr24249,24251-63(JA449-52).

The next day, a Friday with no jury deliberations, the court asked if any party would object to Pavlick's dismissal. The government said it would not object, and Warner moved to dismiss Pavlick. Tr24295(JA461). There was no objection from Ryan's counsel, who later characterized Pavlick as a "stealth juror," and an "unmitigated liar," who lied to get on the jury because of bias against Ryan due to his driver's license suspensions and revocation. Tr24335-36(JA471). The court said it could not in good conscience refuse to dismiss Pavlick. Tr24296-97(JA461-62).

Ezell's background check revealed seven criminal arrests and an outstanding warrant for driving on a suspended license and failure to show proof of insurance. Tr24276-77(JA456). Among the arrests was one for possession with intent to deliver cocaine, one for assault, and one for battery. Tr24276-77,24303-08,24340,24442(JA456,463-64,472,499). Ezell's arrests also included one for disorderly

conduct in which she had used a false name, "Thora Jones," as confirmed by the arrest fingerprints matching Ezell's. Tr24304-05,24472-73(JA463-64,506). Ezell's daughter had extensive criminal history, and records showed Ezell signed an appearance bond for her daughter in 2003 upon a felony drug arrest. Tr24309-10(JA465). Ezell had not disclosed any of these matters in response to question #82. Tr24366(JA480). The court indicated it would question Ezell on Monday. At Ryan's suggestion, the court asked the government to run background checks of the remaining jurors. Tr24286-88,24302(JA459,463).

Over the weekend, the government shared records that revealed several jurors had an undisclosed misdemeanor arrest or conviction. Tr24366(JA480). On Monday and Tuesday, the court conducted a thorough inquiry of each juror at issue. The government asked the court to apply the standard set out in *McDonough Power Equipment v. Greenwood*, 464 U.S. 548 (1984), in evaluating misstatements on the questionnaires: to determine, first, whether a particular juror failed to answer honestly a material question, and, second, whether a correct response would have provided a valid basis to dismiss the juror for cause. R779;Tr24368-69, 24424(JA480,494).

Prior to Ezell's questioning, the government maintained that Ezell's use of the name "Thora Jones" during one arrest, had it been known, would have been the basis to excuse her for cause on bias grounds, since someone who gave law enforcement officers false booking information could not be impartial in a case involving charges of providing false information to law enforcement officers. Tr24423(JA494). The court

then observed, "[I]f, for example, that information had been disclosed on her questionnaire or during *voir dire*, and there would have been a cause challenge, I suspect there would not have been an objection. She would have been excused." Tr24424(JA494).

When questioned by the court, Ezell acknowledged that she was untruthful when filling out the questionnaire: "I never thought I was going to be picked for the jury, so I just—I didn't take time. So no, everything was not truthful because I didn't take the time." Tr24451(JA501). Asked what she omitted, Ezell said there were charges. She mentioned being stopped with marijuana and once being arrested with others. *Id*. Asked whether her children had criminal histories, Ezell said, "No, not that I know of. My daughter . . . , she may have—she has had some problems, but exactly what it is, I don't know." Tr24453(JA501). Asked if she knew her daughter had a felony charge in 2003, Ezell said, "She had some problems, yes." Tr24464(JA504). When the judge, holding a copy of the bond form Ezell signed, asked whether she ever posted bond for her daughter, Ezell looked at the judge's hand and said, "Yes, $600." Tr24464,24470,24472(JA504,506). When asked about the name "Thora Jones," Ezell denied using that name as far as she recalled. Tr24463(JA504).

After this questioning, the court observed, "at least one of the answers on her questionnaire might be deemed truthful, but another one, it seems to me, really can't be deemed truthful. And some of the answers she gave me just now about her own daughter, it seems to me, aren't truthful." Tr24471(JA506). The court further said, "I think on this record it would be very hard to say that Ms. Ezell has not told us

several untruths." Tr24472(JA506). The government reiterated its position that Ezell's use of an alias when arrested disqualified her on bias grounds. Tr24478(JA508). Finding that Ezell "concealed and withheld a great deal of information," the court then said, "[a]nd the critical question is, had this question been answered honestly, would it have been grounds for cause? I can't imagine that the answer is anything other than yes. I think I have to excuse her." Tr24479-80(JA508). Warner's counsel agreed: "[I]n light of your Honor's findings, we think she should be excused." Tr24483(JA509).

Ryan's counsel initially took no position regarding Ezell, saying he wanted to review the transcript of her just-completed questioning. Tr24482(JA509). He disagreed with the *McDonough* standard proposed by the government and said, "[T]he standard ought to be that if somebody lied on their questionnaire with respect to any question, they should be off the jury." *Id*. (Ryan articulated his position in a filing the next day: "*The parties are not challenging jurors who have made honest mistakes or have given merely incorrect answers.* Rather, the parties are focused on jurors who have deliberately concealed information. . . ." R780 (emphasis added).)

Asking Ryan's counsel, "assuming your standard, what imaginable basis is there to retain Ms. Ezell?" Tr24483(JA509), the court reviewed the transcript, reading aloud Ezell's statement that everything in her questionnaire was not truthful because she did not take the time. The court also found "this morning that her answers to questions about her experience with court were untruthful, and I think she told us something untruthful about her knowledge of her daughter's criminal history. She

signed a bond form in 2003, which she acknowledged when confronted. And she denied ever using the name Thora Jones, although I understand it's a fingerprint match that connects her to the use of that name." Tr24483-84(JA509). The court then stated the standard it would use: "[T]he standards as I understand them are, *was there an untruthful answer to one of the questions on the juror form? And, secondly, if so, would a correct answer to that question have provided a valid basis for a challenge for cause?*" Tr24484(JA509) (emphasis added). The court concluded:

> Let's just start with the use of an alias. I think that probably would have been the basis for a challenge for cause. A truthful answer to the questions about her criminal history would have generated an investigation that would have provided that information.
>
> I don't know what standard we might apply that would not support excusing Ms. Ezell.

Id.

The government moved to dismiss Ezell and proposed the *McDonough* standard for all jurors. Tr24484(JA509). Ryan's counsel again claimed the standard was not correct. Tr24485(JA509). However, he interposed no objection to the "court proceeding" because of Ezell's admission to not being truthful in the questionnaire. *Id*. To clarify Ryan's position, the court asked, "In other words, you would accept the Court's ruling on the basis of her testimony, that not everything in her questionnaire was truthful." Ryan's counsel replied, "Right," *id*., thus acknowledging Ezell did not pass Ryan's standard of "untruthfulness in the questionnaire." Faced with no objection, the court dismissed Ezell, *id*., a decision the court described as "not a close case." Tr24571(JA531).

The next two juror interviews took place at defendants' request. Ryan's counsel, through records searches conducted over the weekend, learned Juror Gomilla filed for bankruptcy in 1996 and had been involved in civil actions, and Juror Talbot filed for bankruptcy in 1995. Tr24370,24498-500,24516(JA481,513,517). Neither juror mentioned these actions in response to question #84 of the questionnaire.[11] The government noted that #84 was in a section titled "Criminal Justice Experience" and was thus ambiguous whether civil matters were to be reported. Tr24393-94(JA486-87). The defendants nevertheless wanted Gomilla and Talbot questioned. Tr24420(JA493).

Over government objection, Tr24420-21,24511(JA493,516), and despite "dismay about digging into Ms. Gomilla's financial history," Tr24417(JA492), the court questioned Gomilla and Talbot. After talking to Gomilla, who said she "never thought of" bankruptcy in connection with #84 and never went to court, Tr24503-04,24508(JA514,515), the court said, "I have grave difficulty understanding how Ms. Gomilla could be excused. I don't think she told us a single thing that is not true." Tr24513(JA517). The court then questioned Talbot, who said he "actually didn't even think about" bankruptcy when responding to #84 and thought, instead, that #84 asked for criminal trouble with the law. Tr24519(JA518). The defense did not move to dismiss Gomilla or Talbot. Tr24520(JA518).

[11]Question #84 read: "Have you ever had to appear in court, or been involved in any lawsuit or court proceeding as a plaintiff, defendant, victim, or witness for any reason other than what you indicated above?" R305:24(JA344).

Juror Svymbersky, an alternate, was then questioned about a 1983 misdemeanor conviction for buying a stolen bicycle at age 18 or 19. Tr24543,24752-53(JA524,577). Svymbersky understood that after a year of court supervision, the charges were dropped or expunged. Tr24543-45,24559,24751-53(JA524-25,528,577). Svymbersky said the matter did not occur to him when answering the questionnaire, Tr24559-60(JA528), and he only thought of it recently, when he heard that jurors were being investigated. Tr24560(JA528). When the court told him he might participate in deliberations, Svymbersky said he would be open-minded. Tr24550(JA526).

Juror Rein was then questioned about a 1980 arrest for battery. Tr24426-27,24621-22(JA495,544). Rein explained that, when he was 22, he and his younger sister, who, unknown to him, was pregnant, had an argument about pets. Tr24628(JA546). Another sister, aware of the pregnancy, called the police. Tr24628-29(JA546). When Rein learned of the pregnancy, he immediately resolved his dispute with his sister. Tr24628-29,24632(JA546,547). Rein said he had not gone to court, but rather he and his sister had gone to a courtroom where a judge, eating lunch, said the issue would be dropped and lectured them against using the police to resolve small family disputes. Tr24630(JA546). Asked why he did not mention the incident on the questionnaire, Rein said, "I really don't think I even thought of it." Tr24631(JA547). In response to the court's inquiry, Rein said that the incident would not affect his ability to deliberate or cause him resentment against any party. Tr24632-33(JA547).

Juror Casino's rap sheet reflected three arrests from the 1960s. Because the underlying records were unavailable, dispositions were difficult to determine.

Tr24641-42(JA549). A 1961 concealed gun charge and 1965 misdemeanor assault charge appeared to have been dismissed, but a 1962 misdemeanor DUI may have resulted in conviction. Tr24641-42,24648(JA549,551). When asked about the gun charge, Casino at first could not remember. After several minutes, Casino recalled the incident, which occurred when he was about 20 and involved a gun that was not his but that was found in his car. Tr24646-49(JA550-51). Casino said he did not report the gun charge on the questionnaire because he did not remember it. Tr24649(JA551). Casino stated he could be fair as a juror. Tr24650(JA551). After the interview, Ryan's counsel asked the court to question Casino about the DUI. Tr24653(JA552). The government opposed this, noting that a 44-year-old DUI conviction would not have been a valid basis for a cause strike. Tr24654,24658(JA552,553). The court observed:

> Grilling Mr. Casino is one of the most distasteful things I have done in this job. This is a decent man who has given us six months of his life, who in his early 20s apparently got involved in some problem of some kind. I cannot imagine that these would have been a basis for a cause challenge. I cannot imagine . . . that anybody would have exercised a peremptory challenge against this man for something that he did in the 1960s that he in good faith does not remember.

Tr24659(JA554).

Juror Masri reported in his questionnaire a DUI conviction in 2000. In *voir dire*, no party moved to strike him. Tr2015,24615-16,24618(JA543). Masri's background check showed another DUI conviction in 2004 and that he was on conditional discharge or probation in September 2005. Tr24615-16(JA543). When questioned, Masri said he had not reported that DUI on the questionnaire because he did not know if he had

to mention it until it was final on his record. Not wanting to be wrong in describing it, he decided not to put it down. Tr24663-65(JA555).

The defense argued that Svymbersky, Rein, Casino, and Masri lied on the questionnaires, and the government disagreed, arguing that, under the *McDonough* standard, all four jurors were fit to serve. Tr24669-98(JA556-63). After a recess to consider her decision, the judge said she was putting Svymbersky and Masri in the same category because they both had convictions they did not disclose. Tr24721(JA569). Though mentioning she was satisfied personally by their explanations, she tentatively determined that, "had either of those individual's records been disclosed, I might have honored a cause challenge." Tr24722(JA570). She stated this would "potentially" leave eleven jurors, and she discussed how she would go about reinstructing the eleven jurors. Tr24722-23(JA570).

Ryan's counsel then reiterated objections to Rein and Casino. Tr24725-26 (JA570-71). The government asked for reconsideration of the court's indication that someone who bought a stolen bicycle at age 18 or 19 could be dismissed for cause. Tr24726-37(JA571-73). The government pointed out that the court found Svymbersky did not make any intentional misrepresentations. Tr24730-31,24733,24737(JA572,573). While government counsel stated that they were not arguing for Masri, who during jury selection did not report he was currently on probation and was therefore materially different from Svymbersky, Tr24728,24734,24737(JA571,573), they urged that Svymbersky should not be

dismissed on the basis of his buying a stolen bike in 1983. Tr24726-37(JA571-73). Ryan's counsel again objected to Casino. Tr24735,24737(JA573).

Facing these arguments, the judge decided to re-interview Casino and Svymbersky, and she heard Ryan's argument for dismissing Rein. Tr24737-38(JA573-74). In addition to calling Rein a "compulsive liar," Tr24740(JA574), Ryan's counsel claimed that Rein's 1980 dismissed battery charge called into question his emotional stability. Tr24738(JA574). The court said it would not dismiss Rein:

> The fact that somebody slaps his sister does not—more than 20 years ago—does not satisfy me that that person is emotionally unstable. . . .
>
> The man has been employed. He has lived for years and years. There is no other indication that he has a problem controlling his temper. He acknowledges it was a silly incident. Each one of us has been engaged in conduct that we would characterize as silly, especially when we are young people.
>
> I don't think that his answers to me were not straightforward.

Tr24741(JA574).

The court interviewed Casino about the 1962 DUI charge, which Casino said he did not remember and had not reported for that reason. Tr24743-44(JA575). Casino said he did not know the disposition of the charge and did not think he was ever in custody. *Id.* The court then overruled the defense motion to dismiss Casino:

> This juror is as credible as any juror I have had.
>
> We are talking about things that occurred 40 years ago. There is no indication that he . . . willfully failed to disclose. He owned up to it. He apologized. I think the notion that he just genuinely forgot makes sense.
>
> . . . I think if this is a conviction, a conviction this old that I am morally satisfied the individual genuinely did not remember could not be a basis to disqualify him from service on the jury.

Tr24745(JA575).

The court reinterviewed Svymbersky, asking why he had not reported the bike incident. Svymbersky stated, "I just didn't think of it. I really don't remember at that time, filling out that questionnaire, thinking about this incident or any incident at all. . . . I did not intentionally come to be dishonest and lie about that. It just did not come into my mind at the time of filling out that questionnaire." Tr24754(JA578). *See also* Tr24751(JA577).

The judge believed Svymbersky and, changing her tentative decision to excuse him, she said she would seat him. Tr24759(JA579). No party having asked her to reconsider her tentative decision on Masri,[12] the judge stated, "And that means I am excusing Mr. Masri." *Id*.

During these proceedings, Judge Pallmeyer expressed, *no fewer than twelve times*, her view that the defendants' right to a fair trial was paramount and that, if fairness could not be achieved, she would not hesitate to declare a mistrial and start the trial over, despite the investment of time that had gone into the trial. *E.g.,* Tr24604(JA540) ("[T]he very first goal here is a fair trial. If we can't give these defendants a fair trial, we will, despite the despair that I will feel about it, declare this case at an end and start over."); *see also* Tr24368,24382,24525,24577-78,24588-89,24593,24614,24708-09,24787,24797-98,24799(JA480,484,494,520,533,535-37,542,

[12]Before the recess, the defense argued extensively that the court should not seat Masri, Tr24669-82(JA556-59), and after the recess, government counsel said they were not arguing for him. Tr24728,24734,24737(JA571,573).

566,586,588-89). She also expressed, repeatedly, her acceptance of the possibility of a mistrial, vowing to monitor the new deliberations and inviting defense arguments, even on a daily basis, "about whether or not it's time . . . to recognize that this isn't going to work." Tr24724-25(JA570); *see also* Tr24425,24723,24787,24797-98(JA494,570,586,588-89).

c. Start of the Deliberations of the Reconstituted Jury

Before restarting jury deliberations with alternates DiMartino and Svymbersky, the court ensured they had had no discussions or exposure to publicity about the case. Both satisfied the court that they had not. Tr24531,24539-42,24546-48,24559 (JA521,523-24,535,528).

The court questioned all remaining jurors individually to make sure each understood the need to deliberate anew and was capable of doing so. Tr24744,24759-78(JA575,579-84). The court then re-read to the jury the entire jury instructions, Tr24804-90(JA590-612), with the addition of one instruction, crafted to allay defense concerns that jurors questioned about their criminal histories might, out of worry, try to please the prosecution,[13] Tr24654-59,24784-85,24788-91(JA552-54,585,586-87), and to reinforce the court's directive, given to each juror individually, that the jurors were to put the prior deliberations out of their minds. Tr24785-87(JA585-86). This instruction read in part:

[13]The court thought that the investigation might instead lead jurors to sympathize with appellants. Tr24691(JA562).

> [T]he circumstances that brought about the fact that . . . two jurors were excused . . . were not prompted by any of the lawyers or by the parties in this case, nor by your previous deliberations, those of you who were here. Rather, the inquiry was generated by members of the media. It is not related to the lawyers in this case. . . .
>
> The fact that there have been circumstances that led to two jurors being excused should not in any way enter into your deliberations.
>
> Because I am asking you to start your deliberations over, it is imperative that you completely put your prior deliberations out of your mind. You must treat this case as if the prior deliberations did not occur. You also should not discuss or mention any statements or comments made during the prior deliberations when you begin these new deliberations.
>
> I have conducted some interviews and follow-up questioning of a number of you . . . [T]hat process is now complete, and I do not anticipate any further questioning of the jurors. In any event, none of my questions should be considered in any way as you deliberate in this case.

Tr24804-05(JA590). The court also removed from the jury room all charts, diagrams, or drawings made by the jurors and previous copies of the instructions, along with the audiovisual equipment, list of witnesses, and transcripts of testimony that the jury had requested. Tr24802,24859(JA590,604). The reconstituted jury began deliberating Wednesday morning, March 29.

On April 13, after Juror Chambers was interviewed about an alleged interaction with a coffee vendor, the defense told the court that, through a records check, they learned Chambers was involved in divorce proceedings. Tr25275. They argued that, by not mentioning divorce proceedings when answering question #84, Chambers lied on her questionnaire, Tr25293, despite the fact that she indicated twice on the questionnaire that she was separated, Tr25279-80, and the fact that #84 appeared under the heading "Criminal Justice Experience." Tr25280. The defendants claimed Chambers' experiences in her divorce proceedings would have been of great interest to

them during *voir dire*, Tr25284-85, even though, during *voir dire*, defense counsel never asked any divorced prospective jurors about their experiences in their divorce proceedings. R867:68(JA68).

Over government objection, Tr25294, minutes before the verdict was returned, the court interviewed Chambers about her answer. After reviewing the questionnaire, she stated that, when answering #84, she was not thinking about divorce proceedings or orders of protection; she viewed the question as pertaining to criminal proceedings. Tr25407-08.[14] After the interview, the court applied the *McDonough* standard, finding that Chambers did not intentionally conceal information, Tr25418, and that Chamber's response would not have supported a challenge for cause, Tr25419, findings the court reiterated in post-verdict rulings. 5/4/06Tr46-47; R867:68(JA68).

The jury deliberated ten days, during which they requested and received a projector, a list of witnesses, an April calendar (to determine court holidays), and transcripts of the testimony of four witnesses whose transcripts of testimony the original jury had requested. Tr24895-905. The jury also requested guidance on Count 18. Tr24921.

On April 17, the jury found appellants guilty on all counts.

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[14]Of the 46 prospective jurors who indicated they were divorced, 40 did not report their divorce actions in response to #84. R832:Exh9. Thus, as the court stated in a post-trial order, Chambers "was in good company in believing that question #84 was not asking about divorce actions." R867:68(JA68).

C. Analysis

1. The District Court Properly Removed and Replaced Two Jurors.

Rule 24 affords district courts discretion to impanel "alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties," Fed. R. Crim. P. 24(c)(1), even after deliberations have begun. Fed. R. Crim. P. 24(c)(3). Replacement "might be especially appropriate in a long, costly, and complicated case." 1999 amendments, advisory committee notes. Referring to Rule 24(c)(3), this Court has stated, "the fact that an alternate missed some of the deliberations is no longer regarded as a fatal objection, *or indeed as any objection*, to his participating in the jury's decision." *United States v. Johnson*, 223 F.3d 665, 670 (7th Cir. 2000) (emphasis added).

Here, the district court applied the Supreme Court's well-settled test applicable to alleged misstatements during *voir dire*: (1) whether the juror failed to answer honestly a material question; and (2) whether a correct response would have provided a valid basis for dismissal for cause. *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 556 (1984).[15]

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[15]Though *McDonough* concerned a post-verdict inquiry, its application to juror misstatements discovered pre-verdict is very sound. Under *McDonough*, the court determines whether, despite a misstatement in voir dire, the juror was able to be fair, since the only reason to strike a juror for cause *at any time* is if the juror is unavailable or cannot be fair. In two cases where alleged juror misstatements were discovered prior to verdict, the trial courts basically did what Judge Pallmeyer did—interviewed the juror about the alleged misstatement and determined if there was basis for cause dismissal or if the juror could be fair. *United States v. Brown*, 102 F.3d 1390, 1398 (5th Cir. 1996); *Dennis v. Mitchell*, 68 F. Supp. 2d 863, 885-87 (N.D. Ohio 1999). Any lesser

Under the first prong of *McDonough*, honest but mistaken responses to *voir dire* questions are insufficient to grant a new trial. *See id*. at 555 ("To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give."). Incorrect answers might not be deliberate falsehoods: "jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." *Id*.

Even if the first prong is met, under the second prong of *McDonough*, a new trial is to be granted only if a correct response would have resulted in a successful cause challenge. A juror is removed for cause when he exhibits actual or presumed bias. *See United States v. Harbin*, 250 F.3d 532, 545 (7th Cir. 2001) ("[T]he existence of challenges for cause presumably removes anyone with obvious bias or potential for bias.").

The district court made determinations that Pavlick and Ezell were not credible, finding both failed to provide honest answers to material questions, correct answers to which would have provided a valid basis for dismissing them for cause. Tr24296-97,24301,24471-72,24479-80(JA461-62,463,506,508). *See also* R867:66(JA66) ("the court concluded that their responses were not credible in certain respects, and that truthful answers to the questions would have supported excusing them for cause.")

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test would encourage preverdict gamesmanship to sabotage an anticipated adverse result.

Regarding Ezell, the court concluded that her use of an alias, alone, would have been grounds for cause dismissal. Tr24484(JA509).[16]

In fact, appellants agreed that these two jurors should be dismissed, and they therefore waived objection to their dismissal. Warner moved for Pavlick's dismissal; when the judge asked for any objections to Pavlick's dismissal, Ryan did not object. Tr24295(JA461). Indeed, Ryan's counsel said nothing contrary when the court observed there was no disagreement about dismissing Pavlick. Tr24295-97(JA461-62). And after the court found Ezell was untruthful about her criminal history, counsel for each defendant agreed to her removal. Tr24483,24485(JA509).

Appellants' attempt to evade their waiver regarding Ezell's dismissal rests on their allegation that Judge Pallmeyer "affirmatively misled" them about the standard she would use in dismissing jurors. Br34-35. They contend the judge wanted to ramrod this case to verdict "at any cost." Br34,35n.6. The record unmasks these outrageous claims for what they are—unfair attacks on a jurist who worked tirelessly to ensure a fair trial.

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[16]Ezell's use of a false identity when arrested—thus lying to law enforcement, a crime with which Ryan was charged—her lengthy arrest record, and her outstanding arrest warrant distinguished her from other jurors who had criminal charges in their backgrounds, a point overlooked by appellants in their effort to sanitize Ezell. Br40-41. Compounding the problem, Ezell first denied, then equivocated on, using an alias. Tr24463(JA504). She was also not forthcoming about her knowledge of her daughter's criminal history. Tr24463-64(JA504). Unsurprisingly, the court found Ezell not credible.

Defendants' argument ignores the judge's many statements that she would not sacrifice fairness to avoid a mistrial,[17] as if these statements were window-dressing unworthy of mention. They were no such thing. The judge matched her statements with hours of painstaking interviews at defendants' request, even interviewing jurors with nothing in their record remotely approaching grounds for cause dismissal. Far from ramrodding the case to verdict, before restarting deliberations, the court invited defendants to make arguments daily "about whether or not it's time . . . to recognize that this isn't going to work." Tr24724-25(JA570).

As for defendants' absurd claim that the court "affirmatively misled" them about the standard the court would use, the record shows nothing of the sort. After questioning Ezell, the court twice articulated the *McDonough* standard as the standard she would employ in determining Ezell's fitness to remain as a juror. Tr24479-80,24484(JA508,509). Ryan's counsel claimed the right standard was simply whether a juror was untruthful in her answers. When, after reviewing the transcript of Ezell's responses to Judge Pallmeyer, Ryan's counsel saw that Ezell admitted she was not truthful in her questionnaire, his own "untruthfulness" standard was met, and he agreed to Ezell's dismissal. Tr24485(JA509). The record is clear that the judge did not "accept" Ryan's proposed "untruthfulness" standard or propose it herself, as appellants would have this Court believe. Judge Pallmeyer applied the *McDonough* standard and through a question to Ryan's counsel clarified that the reason Ryan was not objecting

[17] *See* Tr24077,24368,24425,24525,24577-78,24588-89,24604,24614,24723-25,24787,24797-99(JA405,480,494,520,533,535-36,540,542,570,586,588-89).

was because Ezell admitted to being untruthful on the questionnaire, thus flunking even Ryan's standard.[18]

Even if there was no waiver, Ezell flunked Ryan's standard and the others did not. Judge Pallmeyer assessed the credibility of Rein, Svymbersky, and Casino, and determined these jurors were not intentionally dishonest or untruthful, either on their questionnaires or in their oral responses to her. R867:67(JA67); *see also* Tr24741,24745,24759(JA574,575,579). Thus, appellants cannot show prejudice—the court's credibility findings were such that, even under the "untruthfulness" standard they advocated, Pavlick and Ezell would have been dismissed and the other three jurors would not have been dismissed.[19]

Appellants' views about jurors' fitness for duty changed dramatically from pretrial proceedings to jury deliberations. During voir dire, appellants were forgiving of Talbot's lapse in disclosure (Tr2280-81), did not dig into jurors' backgrounds (Tr24374-75), and did not probe into personal matters, such as divorce, remote from issues in the case (R867:68(JA68)). Post-trial, they reversed course and adopted a unforgiving view of omissions (*e.g.*, Tr24740), investigated jurors' financial backgrounds (Tr24370(JA481)) and personal matters such as divorce (Tr25275). This

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[18]"THE COURT: In other words, you would accept the Court's ruling on the basis of her testimony, that not everything in her questionnaire was truthful. [RYAN'S COUNSEL]: Right." Tr24485(JA509)

[19]As the court put it: "assuming [Ryan's] standard, what imaginable basis is there to retain Ms. Ezell?" Tr24483(JA509). *See also* Tr24484(JA509).

Court should not sanction giving appellants (and future litigants) "two bites" at the jury selection apple, particularly when it comes at personal cost to jurors.

2. Ezell Was Not Dismissed for Being a Defense Holdout.

Appellants claim their right to fair trial was violated because the government was permitted to strike a "holdout" juror, Ezell, after learning her views of the evidence. Br36-38. Because appellants agreed to Ezell's dismissal, they waived this argument as well. Even if they did not, their premise is simply false. Nothing in the record supports the claim that the government—or anyone—had determined that Ezell was a defense holdout when she was dismissed. Indeed, in the immediate wake of the Losacco note, Ryan's counsel proclaimed: "I am not saying the jurors have said they are deadlocked, because I agree with Mr. Collins, they have not." Tr24093(JA410).[20]

At the time Pavlick and Ezell were dismissed, the government, the defense, and the district court were equally unaware of the jurors' views of the evidence. The district court made emphatic findings on this score: "neither the court nor the parties had any knowledge of Ms. Ezell's or Mr. Pavlick's views of the evidence when the court excused them from the jury. Any consideration of those views by this court in its

[20]Appellants' "holdout" argument conflicts with their argument that non-prejudicial substitution was impossible because the jury that included Ezell supposedly deliberated to verdict on several counts. Br47. They cite "juror media interviews," one of which reported that Ezell had voted to *convict* Ryan on one false statement count, to acquit him on another, to acquit Warner on extortion, and the jurors were just turning to the RICO and mail fraud counts when she was dismissed. R802:Exh4. Assuming Ezell's media statements can even be considered under Rule 606(b), it is hardly a "holdout" situation when a juror votes to convict a defendant in deliberations that had only gotten through three of 22 counts.

decision to remove these jurors would have been highly improper." R931:27n.9; *see also* R867:84(JA84) ("this court had no knowledge of Ms. Ezell's views of the evidence").[21]

The very fact appellants never raised this "holdout" argument at the time of Ezell's dismissal is proof enough that the parties did not know her views or believe dismissal related to her views. But ample additional evidence demonstrates the court's factual finding is not clearly erroneous. Up to the two jurors' dismissal, the jury had asked for transcripts, Tr23982(JA379); asked for guidance on Count 14, Tr24022(JA390); asked about the *Pinkerton* instruction, Tr24022(JA390); complained about name-calling, Tr24053(JA399) (note from Ezell); and complained about the refusal of Ezell to deliberate, Tr24074-76(JA405) (Losacco note), but no communication had disclosed any juror's views as to guilt or innocence.

Appellants' reliance on *United States v. Harbin*, 250 F.3d 532 (7th Cir. 2001), is misplaced. In *Harbin*, the district court allowed the government to use a left-over peremptory against a trial juror who the judge had refused to dismiss for cause. *Id.* at 538. The judge compounded the error by not notifying the defense that peremptories would be allowable during trial. *Id.* at 540.

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[21]Appellants claim the parties had knowledge of Ezell's views that the court lacked, Br31, citing Tr24568,24582,24595(JA530,534,537), and R931:27n.9. None of these citations remotely supports appellants' claim. Appellants cite the government's statement "we saw the notes," Tr24582(JA534), as proof the government knew Ezell's views. Br31. However, appellants do not include the words preceding this phrase. The whole statement was "whether she is for us or against us—and obviously we saw the notes," and it conveyed merely that the government did not know Ezell's views and could only speculate.

Here, there was no extra peremptory of any kind. The court found that Ezell's lying to law enforcement by using a false name was grounds for dismissal for cause. Tr24484(JA509). Further, Ezell's removal can hardly be said to be the result of a government peremptory when it was *not objected to by the defense*. And while a juror's view of the evidence cannot be the basis for removal, the court did not remove Ezell for that reason. The court rejected, promptly and unequivocally, the jurors' request to remove Ezell because she was not taking part in deliberations. Tr24141(JA422). This is not like *United States v. Symington*, 195 F.3d 1080, 1088 (9th Cir 1999), where the trial judge removed a juror likely to hang the jury. *Symington* held that "if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Id.* at 1087 (emphasis in original). Here, there was no reasonable possibility that Ezell was removed for her views.[22]

Even if the district court had known Ezell's views (and it did not, R931:27n.9), it would have been within its discretion to dismiss her for valid cause. *See United States v. Edwards*, 303 F.3d 606, 634 (5th Cir. 2002) ("[W]e have previously made clear that hold-out jurors are not immune from dismissal based upon just cause"); *see also Perez v. Marshall*, 119 F.3d 1422, 1427 (9th Cir. 1997).

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[22]When the *government* raised *Symington*, describing how the Ninth Circuit had not reversed because of the length of deliberations but because the substitution may have been rooted in the juror's views of the case, none of the defense attorneys drew any parallels between that case and Ezell's dismissal. Tr24607-08(JA541).

Nor could Ezell's dismissal have sent a message to the jury that the district court was taking sides in the jury's deliberations, as appellants contend. Even before Ezell, Pavlick was dismissed, and Pavlick had signed the note asking that Ezell be removed. Tr24073-76(JA404-05). The court instructed the jury twice that the removal of Pavlick and Ezell was unrelated to their views. The jurors first were instructed that the removal of Pavlick and Ezell was prompted by the media and not "by any of the lawyers or by the parties in this case, nor by your previous deliberations, those of you who were here. . . ." R867:85(JA85);Tr24804-05(JA590). Even more pointedly, the court further instructed that the "reasons [Pavlick and Ezell] were excused have nothing to do with the views they expressed in early deliberations nor with any communications with me concerning those earlier deliberations." Tr24972. In addition, when responding to the Losacco note, the court told the jury, at defendants' request, "you twelve are the jurors selected to decide this case." R802:Exh1. There is no basis on which to conclude that the remaining jurors understood Ezell's dismissal as based on her views of the evidence. The district court found absolutely no merit in the contention that Ezell's removal chilled free deliberations in the reconstituted jury. R867:85-86(JA85-86). That finding was not clearly erroneous.

3. Appellants Were Not Prejudiced By The Substitution.

Rule 24(c) does not limit replacement of deliberating jurors to any particular time period; it applies under whatever circumstances trial courts deem appropriate (subject to review for abuse of discretion). Courts have upheld verdicts of reconstituted juries even after original deliberations of several days. Very recently, in *United States*

v. Ronda, 455 F.3d 1273 (11th Cir. 2006), where the trial court, after a five-week trial and five days of deliberations, dismissed three jurors and replaced them with two alternates, the Eleventh Circuit found that the trial judge "carefully, thoroughly and correctly handled these [juror] issues." *Id.* at 1300-01. *See also Miller v. Stagner*, 757 F.2d 988, 995 (9th Cir. 1985) (two jurors replaced on fifth day of deliberations after ten-week trial); *United States v. Kopituk*, 690 F.2d 1289, 1294, 1306-11 (11th Cir. 1982) (after seven-month trial, juror replaced after five days of deliberations).

Rule 24(c) requires certain steps to ensure fair deliberations: the trial court must ensure that a retained alternate does not discuss the case with anyone until the alternate replaces a juror or is discharged, and if an alternate "replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew." Rule 24(c)(3). Here, the district court took extensive steps in this regard, even more than required. R867:84-86,94-96(JA84-86,94-96).

The court ensured that the alternates had not been exposed to media coverage, Tr24539-43(JA523-24),[23] and that the alternates would insist that original jurors restart deliberations. Tr24530-35,24542-51(JA521-22,524-26). The court individually questioned and instructed all remaining jurors to ensure they would restart

[23]The court did not need to find that the alternates had not encountered *any* third party comments or media coverage. In *Smith v. Phillips*, 455 U.S. 209, 217 (1982), the Court declared it "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." Courts have upheld substitution even when alternates admitted discussing the case, so long as their views of the case had not been affected. *See Henderson v. Lane*, 613 F.2d 175 (7th Cir. 1980) (alternate discussed case with wife); *United States v. Hillard*, 701 F.2d 1052 (2d Cir. 1983) (alternate discussed case with other alternates).

deliberations, disregarding what had occurred before. Tr24759-78(JA579-84). The court reiterated to the jury its responsibility to start deliberations anew, Tr24805(JA590), and reread the instructions. Tr24804-88,24801-02(JA590-611,589-90). The court removed from the jury room all items from previous deliberations. Tr24802,24859(JA590,604). These measures dispelled any possible prejudice: there is an "almost invariable assumption of the law that the jurors follow their instructions." *United States v. Olano*, 507 U.S. 725, 739 (1993).

The court also was vigilant for any sign that the jury was disobeying its instruction to restart deliberations. *See, e.g.,* Tr24798(JA589) ("[I]f as circumstances unfold in the next hours or days or weeks that satisfy me or trouble me enough that what has gone on is not what I expect these jurors to do, I don't feel that my decision today bars or precludes me in any fashion from changing my mind, if the circumstances warrant it, and telling the jurors that, despite their hard work, they should go home, and we should start again with a fresh set.").

Appellants do not suggest the court failed to employ any particular measure for ensuring that the reconstituted jury started anew, or that the judge failed to follow Rule 24's procedure for dismissal and replacement of jurors. Rather, the argument goes, substitution created a "reasonable possibility of prejudice," and appellants were deprived of their right to trial by an impartial jury. Br47-49. Though appellants rely on *United States v. Register*, 182 F.3d 820 (11th Cir. 1999), it actually provides them no support. First, *Register* predated the 1999 amendment of Rule 24(c)(3), when juror substitution during deliberation was a rule violation, though subject to harmless-error

analysis. Since the rule was amended, such substitution is no longer error—as the Seventh Circuit clearly indicated in *Johnson*. Second, the *Register* court, like other courts faced with such substitution prior to the amendment, looked for *actual* prejudice. *Register*, 182 F.3d at 842 (reversal appropriate "only where 'there is a reasonable possibility that the district court's violation . . . *actually* prejudiced [the defendant] by affecting the jury's *final verdict*;'" verdict will be upheld if trial court gave remedial instructions and "we cannot discern that appellants were prejudiced by the substitution") (emphasis in original). *Accord, United States v. Josefik*, 753 F.2d 585, 587 (7th Cir. 1985) ("only prejudicial violations of the rule are reversible errors"); *see also United States v. Vega*, 72 F.3d 507, 512 (7th Cir. 1995).

In determining, prior to the rule amendment, whether a defendant was prejudiced by substitution, courts looked to the procedural safeguards employed by the trial courts. In *Kopituk*, 690 F.2d at 1308, the Eleventh Circuit found no prejudice where the judge questioned the substitute, examined each remaining regular juror, re-read the jury instructions, and emphasized the need to restart deliberations. *See also United States v. Hillard*, 701 F.2d 1052, 1055-57 (2d Cir. 1983); *United States v. Quiroz-Cortez,* 960 F.2d 418, 420 (5th Cir. 1992).

Courts have also considered, as the district court did here, the length of deliberations after juror substitution to evaluate whether meaningful deliberations occurred. In *Kopituk,* the court held:

> [T]he jurors' individual assurances that they could and would begin deliberating anew, combined with the fact that the jury deliberated for a

> full week subsequent to substitution of the alternate juror, is sufficient indication that the jurors were able to and did in fact obey the court's extensive instruction regarding their duty to eliminate all prior deliberations from their minds and begin with a clean slate.

690 F.2d at 1311.

Here, the reconstituted jury deliberated for ten days before verdict—a circumstance that indicated, as the district court found, the verdict was the product of the reconstituted jury's full and fair deliberations. R931:26.

4. Deliberations Were Not Prejudiced By Background Checks.

Appellants claim background checks on jurors prejudiced the jury because of the "significant risk that jurors who are the subject of law enforcement scrutiny during deliberations in a criminal case will seek to please the prosecution." Br42. This argument is ironic—most background investigations took place at the instance of the defense. Warner's counsel, after learning of the Tribune's investigation, first asked for a rap sheet on Pavlick, Tr24214,24223(JA440,442). Ryan's counsel asked for rap sheets on Ezell and Gomilla, looking for a "more systemic problem," Tr24237(JA446), and later asked for rap sheets on all jurors and alternates, Tr24286(JA459). During deliberations, appellants researched jurors' driving records, Tr24378(JA483), and bankruptcy records, Tr24418,24420(JA493), and wanted to obtain "all the information we can have," Tr24391(JA486), something they chose not to do pretrial. They continued investigating during the reconstituted jury's deliberations, digging into Chambers' divorce records after the district court found that she credibly denied any conversations about the case with a coffee vendor, Tr25279-83,25293, and coming up

with disingenuous arguments for their dogged pursuit, such as the claim that a juror's experience in divorce actions would have been of great interest to them (even though they *never* once asked any divorced jurors in *voir dire* about their divorce experience). Tr25284-85; R867:68(JA68).

Having spearheaded the investigation of deliberating jurors, appellants were in a poor position in the district court to complain that investigating prejudiced them—and yet they did. R817:26-28. They still complain, despite this Court's pronouncement that "[a]n invited error does not work to the benefit of the litigant who issued the invitation." *United States v. Rosby*, 454 F.3d 670, 677 (7th Cir. 2006); *see also United States v. Hubbard*, 22 F.3d 1410, 1421 (7th Cir. 1994).

But whether appellants forfeited objection to the background checks, waived objection, or invited the error complained of, no prejudice followed from the juror investigations. The district court was "not persuaded that there is any reasonable possibility that jurors failed to vote their conscience for fear of prosecution," R867:88(JA88); the court ensured that jurors did not attribute the investigations to either prosecution or defense. Prior to interviewing jurors, the district court explained that neither prosecution nor defense instigated the inquiry, Tr24516-24517,24542,24643-44(JA517-18,524,550), and each juror understood. The district court also instructed the reconstituted jury:

> the circumstances that brought about the fact that these two jurors were excused . . . were not prompted by any of the lawyers or by the parties in this case, nor by your previous deliberations, those of you who were here. Rather, the inquiry was generated by members of the media. It is not

> related to the lawyers in this case. . . . [N]one of my questions should be considered in any way as you deliberate. . . .

Tr24804-05(JA590).

It is purest speculation to suppose that jurors feeling under investigation by the media would seek to please the government by voting guilty (Br42).[24] As the court recognized (Tr24691(JA562)), they would as likely sympathize with appellants, who had also faced investigation. *See* Tr24691(JA562). Ryan's argument that jurors might have seen press articles discussing possible juror prosecutions (Br42) is speculation greater still, given the judge's repeated instructions not to read the press. The district court flatly rejected this argument: "there is no indication in the record that any jurors saw more than headlines in connection with this matter. Nor is the court prepared to assume that the jurors ignored this court's many explicit instructions to avoid such media coverage." R867:87(JA87). In light of all the precautions taken by the district court, there is no basis on which to conclude the investigations of the jurors prejudiced the defense.

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[24]Appellants point to Losacco's comments that she was "scared," Br42, but omit the context: Losacco, facing nine attorneys and the judge in chambers, prefaced her comments by saying "I feel like I'm on a job interview." Tr24767(JA581). The judge found that the large number of attorneys was intimidating, Tr24768-69(JA581), and thereafter put the jurors at ease about the number of lawyers. Tr24769-73,24776(JA581-82,583). Two days later, Losacco turned in to the court security officer a wallet found near her home. Tr24936,24940. Losacco expressed no concern, Tr24913,24917, but defendants claimed that turning it in showed she was frightened and it was "obvious" she thought it possible a defendant was investigating her. Tr24934-35. The court, noting that Losacco did not like appearing before a roomful of people, interviewed Losacco with fewer lawyers. Tr24945. Losacco was not concerned about the wallet and attributed no wrongdoing to any of the lawyers. Tr24952-53.

II. The Jury Was Not Prejudiced By Extraneous Materials.

A. Standard of Review

Denial of a motion for new trial based on allegations that extraneous material prejudiced jury deliberations is reviewed for abuse of discretion. *United States v. Bruscino*, 687 F.2d 938, 941 (7th Cir. 1982) (en banc). "As we cannot put ourselves in the district judge's shoes in these matters we ought to accept his judgment unless we have a very strong conviction of error." *Id.*; *see also United States v. Berry*, 92 F.3d 597, 600 (7th Cir. 1996).

B. Background

Soon after the verdict, Ezell publicly criticized the jury. R802:Exhs3-8. At least two weeks later, after the court publicly noted that the only permissible ground for a post-verdict inquiry would be an allegation of *extraneous* influence, R805:2(JA104), Ezell told the press that Juror Peterson had brought into the jury room "case and law" regarding a juror being dismissed for not deliberating in good faith. R788:Exh1.

On May 5, the court held an inquiry to determine "specifically what it was by way of something extraneous that may have been brought to the jurors' attention." 5/5/06Tr40(JA632). Interviewed by telephone, Ezell claimed that, in the second week of deliberations, Peterson read from papers that "a juror could be dismissed for not deliberating in good faith." Ezell recalled Peterson saying "section" and giving some numbers, "like the section of law that she was reading." 5/5/06Tr11-12(JA625). Ezell claimed that after Peterson finished reading, Juror Losacco said, "No, read the one to her on bribery, because George Ryan was taking bribes and so are you. Because the

only way you can vote the way you're voting is you've got to be getting paid." 5/5/06Tr12(JA625).

Asked why she did not mention this earlier, Ezell said she only remembered the "case law" later: "I never forgot about the bribery, *but I had forgot about the case law*." 5/5/06Tr20(JA627) (emphasis added).

The court then interviewed Peterson by phone.[25] Beforehand, Warner's counsel stated, "if she said, 'This is what I did. This is what I brought in,' and we know what it is, that would end the inquiry." 5/5/06Tr50(JA635). The court agreed: "If I got one juror who credibly told me what it was, I think that would—I would be finished." *Id*. Peterson said Ezell refused to deliberate, and some jurors encouraged Peterson, a teacher, to "do your homework." 5/5/06Tr80(JA642). On her home computer, Peterson looked up how to deal with difficult people, but nothing came of that. *Id.* The next night, she "Google[d] about deliberating," *id*., and received a two-page article by the American Judicature Society about substitution of alternate jurors. R802:Exh6. Although given an opportunity, appellants did not seek to ask anything further about the Google search. 5/5/06Tr85,93(JA644,646); R867:80(JA80)

According to Peterson, she showed the AJS article to several jurors, telling them to look at a paragraph on the second page, 5/5/06Tr77,80(JA642), pertaining to a juror's lack of meaningful deliberation as a possible basis for substituting an alternate juror. Peterson took the material home again and clipped out that paragraph.

[25]Also telephonically present were Peterson's attorneys.

5/5/06Tr77,80-81(JA642-43).[26] (Her attorneys provided the clipped paragraph to the court. R802:Exh7.) The following day, when Ezell said she did not need to deliberate, Peterson read the clipped paragraph once and all the jurors heard it, 5/5/06Tr78,79,81(JA642,643), but there was little or no comment and none of the jurors reacted to it. 5/5/06Tr93-94(JA646).

Peterson also read aloud a note she made on a blank page of a novel while on the train. 5/5/06Tr78(JA642). This was "a handwritten note about her thoughts" regarding jurors' responsibility to support their opinions, which she penned "when she was thinking about it." 5/5/06Tr63(JA638). The note, which Peterson's attorneys gave to the court, stated: "You have the right to speak your opinion, but you have responsibility to use the facts, the testimony to seriously consider. If you don't use evidence and testimony to support your opinion, your [sic] not being responsibly [sic]." R867:77(JA77). Peterson said she read these thoughts to Ezell and the others several times that day. 5/5/06Tr78 (JA642).

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[26]The paragraph states:

> But other bases for substitution raise serious issues about the sanctity of the deliberative process, primarily allegations by some jurors that another juror is unwilling or unable to meaningfully deliberate, or is unwilling to follow the law. Such an allegation requires a hearing where the judge must decide the tricky question whether the juror is truly unfit to serve, or is merely expressing an alternative viewpoint that will likely result in a hung jury. Only if the judge concludes that the challenged juror is truly unfit to serve, will the judge be authorized to dismiss the juror and substitute an alternate juror.

R867:76-77(JA76-77). This is an accurate statement of the law. *See United States v. Baker*, 262 F.3d 124, 130 (2d Cir. 2001).

Peterson said no material was brought into the deliberations regarding bribery, 5/5/06Tr83-84(JA643), and Losacco never said "Read her the one on bribery." *Id.* Peterson further said the AJS material was not referenced, shown, or read at all during the deliberations of the reconstituted jury. 5/5/06Tr89-90(JA645).

After Peterson's interview, the court stated: "I am not inclined to go any further with the investigation here. . . . I think what Ms. Peterson did can only be characterized as a really innocent mistake." 5/5/06Tr94(JA646). The court went on to state:

> There is no substantive comment on any of the evidence in any of this material. There is no definition of bribery. There is no reference to bribery. There is no reference to anything that relates to the jury instructions or to anything contrary to the instructions.
>
> * * *
>
> I am comfortable, under all of the circumstances, that this episode did not prejudice, from an objective perspective, it did not prejudice the outcome.

5/5/06Tr100-01(JA647-48).

Denying appellants' post-trial motions, the court stated: "[T]his court does not believe that the AJS article would coerce a reasonable juror into changing his or her ultimate determination, or abandoning his or her 'honest beliefs.' . . . [T]he court concludes that there is no reasonable possibility that any juror was persuaded to vote contrary to what his/her conscience and understanding of the evidence would otherwise dictate." R867:83-84(JA83-84).

C. Analysis

Retrial is not required whenever a jury is exposed to material not properly in evidence, *United States v. Sababu*, 891 F.2d 1308, 1333 (7th Cir. 1989), but only when there is a "reasonable possibility" that the material affected the jury verdict. "Each case must turn on its special facts, and in each case the crucial factor is the degree and pervasiveness of the prejudicial influence possibly resulting from the jury's exposure to the extraneous material." *Id.* (citations and quotations omitted); *see also United States v. Paneras*, 222 F.3d 406, 411 (7th Cir. 2000).

This inquiry is an objective one. *Bruscino*, 687 F.2d at 940-44. While *Remmer v. United States*, 347 U.S. 227, 229 (1954), presumes prejudice for any *ex parte* communication with a juror, the ultimate issue is whether a "reasonable possibility" exists that the verdict was affected by the contact. *See Whitehead v. Cowan*, 263 F.3d 708, 726 (7th Cir. 2001). If there is no reasonable possibility, then the presumption is overcome. The district court has "substantial discretion over the determination of whether the prejudice arising from the unauthorized contact is rebutted or harmless." *Sababu*, 891 F.2d at 1335 (citation omitted). As made clear in *United States v. Sanders*, 962 F.2d 660, 668-69 (7th Cir. 1992), in considering the possibility of prejudice, courts consider several factors, including (1) the nature of the extraneous material, (2) the jurors' behavior during the trial, (3) the admonitions and instructions given to the jury, and (4) the strength of the evidence against the defendants.

In this case, the district court, after considering all the circumstances, found no reasonable possibility that extraneous material prejudiced the verdict. R867:81-

84(JA81-84). This conclusion, fully supported by the record, was not an abuse of discretion.

1. The Nature of the Extraneous Material

The district court made a factual finding that the jury was exposed to *one item* of extraneous information, the paragraph from the AJS article. R867:76-77(JA76-77). The court found the article "had nothing to do with" the defendants, the witnesses, or any media attention. 5/5/06Tr94-95(JA646). It "concerned only the process of deliberation, and the substance of the article did not contradict any instruction that this court gave the jurors." R867:81(JA81). The court found that its instructions were such that the jury "may have reasonably believed, even without consulting extraneous material, that they could be removed if they refused to 'deliberate.'" R867:83(JA83). Notably, the material did not relate to the facts of the case, which some courts view as "the most potentially prejudicial material." *United States v. Tin Yat Chin*, 275 F. Supp. 2d 382, 385 (E.D.N.Y. 2003); *see also United States v. Estrada*, 45 F.3d 1215, 1226 (8th Cir.), *vacated on other grounds*, 516 U.S. 1023 (1995).

Appellants mistakenly rely on *United States v. Rosenthal*, 445 F.3d 1239 (9th Cir. 2006). In *Rosenthal*, the defendant was charged with cultivating marijuana. During deliberations, one juror, disturbed by the absence of evidence or instructions concerning marijuana's medicinal use, asked an attorney friend whether she must follow the instructions or whether she had "any leeway" for independent thought. *Id.* at 1245-46. The attorney advised that the juror "could get into trouble if [she] tried to

do something outside those instructions," and the juror repeated that to another juror. *Id.* at 1246. The implication was that adverse personal consequences could result from jury nullification. *Id.* Reasoning that "[j]urors cannot fairly determine the outcome of a case if they believe they will face 'trouble' for a conclusion they reach as jurors," *id.*, the Ninth Circuit held that there was a reasonable possibility that the extraneous information prejudicially affected the verdict.

Here, the extraneous information had nothing to do with the "conclusion" that Ezell or any other juror might reach in deliberations. The district court explained it had to nothing to do with "Ezell's vote or views of the evidence." 5/5/06Tr100(JA647). The AJS paragraph stated that failure to deliberate is a basis for substitution, but only after the court *is satisfied that the juror is not merely expressing a viewpoint that will likely result in a hung jury*. In contrast to *Rosenthal*, where there was a threat of adverse consequences for a particular conclusion, the AJS paragraph stated that alternative viewpoints would be *protected*, even if likely to hang the jury. Such a message could hardly have prejudiced the verdict.

Appellants also claim that Peterson's handwritten note was extraneous material, but the district court found otherwise. Specifically, the court found the note was written by Peterson on "a piece of paper that she had torn out of a paperback novel she had been reading on the commuter train," R867:77(JA77), it reflected her thoughts about deliberations, R867:80(JA80);5/5/06Tr62(JA638), and defendants' rights were not

violated "or even implicated by Ms. Peterson's note," R867:81(JA81). That finding of fact is not clearly erroneous.

Appellants now contend the note reflected Peterson's legal research, Br24-25, but there is no evidence to support that. Nothing in the AJS article addresses what jurors' responsibilities are as they express their opinions or that jurors act responsibly when they support their opinions with evidence. Despite appellants' condescending opinion of kindergarten teachers, Br24, the note contained *Peterson's* view of juror responsibility. Indeed, the very text and syntax of the Peterson handwritten note is compelling evidence of a lay person looking within to attempt to articulate a common sensical position in dealing with the Ezell issue. That Peterson *wrote down* her thoughts cannot make a difference, since to hold otherwise would chill jurors from organizing their thoughts in deliberations.

Appellants claim it was the government's burden to demonstrate beyond a reasonable doubt that the extrinsic material was harmless, it failed to carry the burden when it "curtailed" the court's inquiry, and as a result, the court did not unearth "what other extrinsic materials Peterson reviewed." Br26. They are wrong on two accounts. First, this Court has specifically stated that *Remmer* does not require a certain quantum of proof to overcome the presumed prejudice. *Sababu*, 891 F.2d at 1335. Second, appellants forfeited the claim that the district court improperly curtailed the investigation into "extraneous materials Peterson reviewed." Defense counsel were given the opportunity to pose questions for Peterson about her handwritten note and details of her internet search, and they chose not to do so. R867:80(JA80);

5/5/06Tr93(JA646). Having forfeited this claim, the actions of the district court are reviewed for plain error. *Olano*, 507 U.S. at 732-33.

There was no error: the court sought to identify any extraneous material to which the jury was exposed and invited the assistance of counsel. The court was not required to negate every speculative possibility of extraneous influence. "The defendant has the burden to show that the jury has been exposed to extrinsic evidence." *Ronda*, 455 F.3d at 1299; *see also United States v. Davis*, 15 F.3d 1393, 1412 (7th Cir. 1994). Peterson explained the events surrounding extraneous material that she brought to the jury room—what she did and found. There is no basis on which to conclude that she read anything else, and the court was satisfied that Peterson provided the court with all the materials she consulted. R867:79(JA79). The defense apparently thought so, too, since they had no additional questions.[27]

Accompanying their insubstantial arguments regarding the extrinsic material itself, appellants make the wholly speculative claim that jurors "engaged in a calculated effort to obtain extrinsic legal information to quell dissent in the jury room." Br22. Appellants claim that a group of jurors, bent on conviction, schemed to rid

[27]Although appellants cite Ezell for the proposition that Peterson presented another legal article to the jury and that Peterson had materials on bribery, Br26, the district court completely discredited Ezell: "[A]ny references to or allegations of bribery during deliberations were not made in connection with extraneous materials." R867:79(JA79); *see also* 5/5/06Tr100(JA647) ("There is no definition of bribery. There is no reference to bribery. There is no reference to anything that relates to the jury instructions or to anything contrary to the instructions.")

themselves of the lone juror standing athwart them and the extraneous material was part of that scheme. Br27.

Appellants' fiction was flatly rejected by the trial court: "The court is not persuaded by the notion, advanced on numerous occasions by Ryan's counsel, that a cadre of jurors sought to silence dissenting views of the evidence, and that Ms. Peterson's research is another facet of their scheme." R867:84(JA84). Immediately after hearing Peterson, the district court found that the extraneous information was Peterson's "response to what she perceived as difficulty in the deliberations, but not to Ms. Ezell's vote or views of the evidence." 5/5/06Tr95(JA646).

Further, any additional inquiry by the court into the events that occurred in the jury room was strictly prohibited:

> The proper procedure . . . is for the judge to limit the questions asked the jurors to whether the communication was made and what it contained, and then, having determined that the communication took place and what exactly it said, to determine—without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion—whether there is a reasonable possibility that the communication altered their verdict.

Haugh v. Jones & Laughlin Steel Corp., 949 F2d 914, 917 (7th Cir. 1991). Thus whether Ezell supposedly "froze" or wept, Br27, or perceived the Peterson material as an intimidating attempt to silence her, *id.*, is beside the point: Rule 606(b) prohibits this attempt to unpack a jury's thought process. To hold otherwise would invite trials about trials and, ultimately, would disable the efficacy of our jury system. *See Tanner v. United States*, 483 U.S. 107, 120-21 (1987).

Even if an inquiry could be made as to the effect of extraneous material (which Rule 606(b) prohibits), contrary to appellants' repeated claims, Ezell was not affected or traumatized by the extraneous material—she had *forgotten* about it. 5/5/06Tr20(JA627). Moreover, the effect of this material on Ezell is irrelevant—she did not deliberate to verdict.

2. The Jury's Behavior

The court considered the behavior of this "diligent and impartial" jury. R867:65,84(JA65,84). "They sat attentively through nearly six months of evidence and deliberated 10 days before reaching their verdict. The court believes that these jurors made every effort to be fair, even amid extraordinary public scrutiny." R867:84(JA84). Throughout trial, no juror was absent;[28] they never complained about the schedule. Tr24800(JA589). They demonstrated diligence throughout trial. *See* R867:72-73(JA72-73) (jury concerned about sleeping juror), Tr13988-91 (concern about discussion of evidence), Tr13854-55 (asking permission to share magazine), Tr4322-23 (noticing mistake in defense exhibit). During deliberations, jurors requested tools for reviewing evidence as well as some transcripts. *See, e.g.*, Tr24895-96. After being reconstituted, they deliberated 10 days before verdict, showing they took their obligation and the court's instructions seriously. *See* Tr24799-801(JA589).

3. Instructions to the Jury

[28]In fact, the one juror who was late (and routinely so) was Ezell. Tr24325(JA469).

Any effect of the AJS material was cured by the judge's instructions. First, as a preliminary matter, the court admonished the jurors many times that they were to consider only the evidence in reaching their verdict. *E.g.,* Tr24807-09(JA591). Second, in response to the Losacco note, which asked for Ezell's dismissal for failing to deliberate, the court responded: "You twelve are the jurors selected to decide this case." R802:Exh1. Third, before impaneling the alternates, the court spoke to each of the jurors who had been deliberating, inquiring whether they could put out of their minds all that had taken place during the first deliberations (which included the extraneous information) and start over again. Each juror said they could. Tr24759-78(JA579-84). Fourth, prior to the second deliberations, the jurors were instructed as a group that "in attempting to reach verdicts in this case, you are answerable only to your own conscience." The instruction went on to state: "it is imperative that you completely put your prior deliberations out of your mind. You must treat this case as if the prior deliberations did not occur. You also should not discuss or mention statements made during the prior deliberations during these new deliberations." Tr24805(JA590).

The power of instructions like these has been acknowledged by many courts. *Ronda*, 455 F.3d at 1300-01 (reissuing all instructions and directing reconstituted jury to begin anew ensured extrinsic evidence did not pose reasonable possibility of prejudice); *see also United States v. Acevedo*, 141 F.3d 1421 (11th Cir. 1998);

Bayramoglu v. Estelle, 806 F.2d 880, 882-84, 888 (9th Cir. 1986).[29] Here these curative instructions and individual *voir dire* of the jurors prior to the restarted deliberations ensured that any possible prejudice associated with the extraneous information was eliminated from the second deliberations. There is no reasonable possibility that this information prejudicially affected the verdict.

4. Strength of the Evidence

The government presented overwhelming evidence that Ryan and Warner engaged in a scheme to defraud Illinois taxpayers. While steering government leases and contracts to Warner and other associates, Ryan and his family reaped valuable financial benefits from these associates that influenced him in his governmental decision-making process. The government presented over 80 witnesses and reams of documents as evidence of appellants' guilt. The evidence showed Ryan concealed his participation in the scheme, even lying to law enforcement, and Warner did likewise, using nominees, structuring financial transactions, and engaging in other third-party transactions.

Considering the strength of the evidence and the other factors discussed above, there is no reasonable possibility that the extraneous information prejudicially affected the verdict in this case.

III. The Court Properly Excluded Evidence Concerning Ryan's Successor and the Merits of Ryan's Policies.

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[29]In *Rosenthal*, on which appellants rely, there was no curative instruction that could have counteracted prejudice caused by the extraneous information.

A. Standard of Review

A district court's evidentiary decisions are reviewed for abuse of discretion and are afforded "great deference." *United States v. Seals,* 419 F.3d 600, 606 (7th Cir.2005).

B. Analysis

Mail fraud is a specific intent crime, and a defendant is entitled to introduce evidence of his good faith or absence of intent to defraud. *United States v. Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1982). But not all evidence, "no matter how tangential, irrelevant or otherwise inadmissible, must be admitted simply because the defendant claims that it establishes his good faith." *United States v. Longfellow,* 43 F.3d 318, 321-22 (7th Cir. 1994).

Ryan had wide latitude in introducing evidence of his good faith or lack of intent. Ryan was allowed, for instance, to elicit testimony that he acted at the recommendation of lower-level employees and the State paid a fair price for the services or property provided under the charged contracts and leases. *See, e.g.,* Tr6394-95,6458,19927(South Holland),4369,20076(Bellwood),4387,20039(Joliet),4711 (Lincoln Towers),4123,4151(IBM contract),6812 (Viisage contract). Actions of his predecessor in office were also allowed. Tr4217,4762. He complains, however, that the district court erred in excluding evidence of certain actions of his successor, Jesse White, and of the merits of his policies. His arguments are without merit.

1. The District Court Properly Excluded Evidence of Lease and Contract Renewals by Ryan's Successor.

Ryan sought to introduce evidence of White's decisions on leases and a contract. The court, however, excluded this evidence as irrelevant: "the fact that a subsequent secretary of state renewed contracts [Ryan] approved during his prior administration in no way 'demonstrates the legitimacy of the deals,' much less that Illinois taxpayers benefitted from them during Ryan's administration." R439:7(JA113). The court also noted that admission of White's actions would precipitate a series of "mini-trials" that would delay the "already lengthy proceedings." *Id.*

Contrary to Ryan's argument, the district court did not arbitrarily adopt a "bright line" for the admission of good faith evidence irrespective of the potential relevance of the evidence. In fact, Ryan was permitted to elicit testimony about his predecessor's actions. Tr4217(ADM contract),4762(currency-exchange rate increase).

Ryan also accuses the district court of adopting a double standard under which the government, but not the defense, was allowed to introduce evidence of events that occurred after Ryan approved the pertinent leases or contracts, and he cites the testimony of Glen Good. Br53. Ryan's argument is misguided. Good was responsible for maintenance of properties *during* Ryan's terms as SOS, and his testimony related to observations of that property while Ryan was SOS. Tr9900,9920,9938. Good opposed the renewal of the lease at 17 North State (Tr9958), so his testimony was admissible to establish the condition of the properties and also to rebut the defense that Ryan was merely following the recommendations of "the professionals" in taking the actions that he did, such as renewing the 17 North State lease.

Similarly, the testimony provided by government expert Linas Norusis, while necessarily done retrospectively, compared the price paid for some of the subject properties with the price for comparable properties *at the time* that Ryan awarded the subject leases. Tr10978(Joliet),11023(South Holland),11038 (Bellwood). The district court permitted testimony from a defense expert who also offered a retrospective analysis of whether some of the subject leases were at fair or market value. Tr19927(South Holland),20037(Joliet),20076 (Bellwood). Ryan's expert went even further by basing his opinion, in part, on an analysis of leases and/or properties not available for rent until years after the subject leases were awarded. Tr20209-10.

The court's exclusion of evidence of White's subsequent actions was not error. Even if it was error, it was harmless, given the latitude the district court allowed Ryan in introducing evidence of his good faith (including actions of his predecessor) and especially in light of the marginal relevance of White's actions.

2. The District Court Properly Excluded Evidence of Currency Exchange Rate Increases by Ryan's Successor.

The government introduced evidence of a currency exchange rate increase approved by Ryan following discussion with currency exchange mogul Harry Klein, who provided Ryan free lodging in Jamaica. Tr2853. Ryan complains the court erroneously excluded evidence of other currency exchange rate increases approved by Ryan's successor (White) and predecessor (Edgar) offered to show Ryan's good faith or lack of intent. Br54.

Yet the court *did* permit Ryan to introduce evidence that the 1995 currency exchange rate increase was consistent with the practice of his predecessor. Ryan's counsel introduced a January 1992 SOS memorandum stating that the last rate increase had occurred in March 1985 and that in the last year of Edgar's SOS term, "increases had been approved but never enacted." Tr4762. Ryan's counsel also introduced a January 1991 SOS memorandum stating that "rates have not been increased since 1984 and based on need, an increase is warranted. Secretary Edgar promised the financial institutions a raise prior to his leaving office." Tr13508. Ryan's counsel elicited testimony that political ramifications militated against a rate increase before the 1994 election, as opposed to after. Tr13512-13513. Thus, the court permitted Ryan to introduce evidence, including actions by Edgar, to advance the defense claim that the 1995 rate increase was a logical policy decision, overdue and not in any way motivated by the free Jamaican lodging that Klein gave Ryan.

The district court properly excluded, however, evidence of currency exchange rate increases approved by Jesse White. As the district court noted, "Ryan certainly could not have considered, or been influenced in any way by, Secretary White's decision to increase the currency exchange rate in 2002 and 2005, six and ten years, respectively, after Ryan's 1995 increase." R439:4-5(JA110-11). The subsequent rate increases by White were irrelevant to Ryan's state of mind in 1995 when he approved the increase at issue.

3. The District Court Properly Excluded Evidence of Ryan's Policy Decisions.

Ryan complains that he "should have been allowed to present evidence showing the broad scope of his honest service in public office, including capital justice reform, health care coverage, environmental protection, prevention of drunk driving and organ donor awareness." Br55. The substance of Ryan's policy decisions were irrelevant, though, and the district court properly rejected a broader effort to make the trial a referendum on his policies.

In a pre-trial ruling excluding evidence concerning Ryan's decisions on the death penalty, the district court observed that it could see "no meaningful relationship between Ryan's decisions regarding the death penalty and the offense conduct with which he is charged here."[30] R276:25(JA162). The district court further observed that Ryan's actions on policy matters were not alleged to be part of the charged scheme, and were not probative of Ryan's intent on the charged crimes. *Id.*

While the court excluded evidence of the *substance* of Ryan's policy decisions, it allowed Ryan on multiple occasions to elicit testimony describing various policy initiatives and accomplishments, including strengthening drunk-driving laws, improving the state library system, developing an organ-donor registry, and reforming the death-penalty laws. *See, e.g.,* Tr4032-33,4790-93,(Fawell);7765-66,7788,7790 (Juliano);13500-01(Wright);13618(Bettenhausen). Ryan's counsel argued to the jury that while in office, Ryan was preoccupied with major policy issues, such as death

[30]With very limited exceptions, the charged conduct occurred long before Ryan's involvement with death-penalty reform.

penalty reform, and it was unlikely he paid much attention to the allegedly corrupt contracts and leases that were the subject of the indictment. Tr23268.

Ryan complains further that the district court refused to allow evidence of his death penalty stance even when that evidence was offered for "another purpose," such as impeachment of a witness or to show a character witness' familiarity with Ryan. Br56. On one occasion, when Ryan sought to impeach a witness with his disagreement with Ryan's death penalty stance, the district court struck a proper balance by permitting cross-examination on the witness' disagreement with Ryan on a "public policy" matter.[31] Tr14197. Similarly, the district court allowed Ryan to call eleven character witnesses, many of whom testified about their knowledge of Ryan's character from their involvement with him on various "social policy" issues.[32] *See, e.g.,* Tr19726,19905,19992,19999,20672,20679,20705. The district court, having correctly ruled that the substance of Ryan's public policies was inadmissible, was not obliged to

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[31]The witness—Patrick Quinn—was a former state prosecutor and current appellate state court judge who testified that in 1992, while Quinn was employed at the Cook County State's Attorney's Office, Ryan angrily rejected his suggestion for combating the issuance of fraudulent drivers' licenses. Tr14212. Ryan's counsel sought to establish Quinn's bias by eliciting his disapproval of Ryan's commutation of death sentences. Tr14192. The district court rejected Ryan's request, but allowed Ryan to elicit Quinn's disagreement with Ryan's decision in a "public policy arena." Tr14197. Ryan chose not to impeach as approved by the district court. Tr14216-39.

[32]One of the character witnesses—Sister Helen Prejean—is a widely known spokesperson for death-penalty reform whose work was the subject of a feature film. Tr19394,19990-96. During her testimony, Prejean made no explicit reference to her death-penalty work, but stated that she had met Ryan at a conference on human rights and over the years had "deep discussions" with him about issues of social policy of great import to Prejean. Tr19992.

allow Ryan to "back door" the evidence through character witnesses or impeachment of a prosecution witness. Since on repeated occasions Ryan elicited testimony about the various policy issues that he was working on, including the death penalty, any error in excluding testimony about his actions on these issues was harmless given its marginal relevance.

IV. The RICO Charge Was Legally Sound and the Instructions were Correct.

A. Standard of Review

Challenges to the sufficiency of an indictment are reviewed *de novo*. *United States v. Smith*, 230 F.3d 300, 305 (7th Cir. 2000). A district court's decision regarding the language of a proposed jury instruction is reviewed for abuse of discretion when the defendant has made a proper objection. *United States v. Irorere,* 228 F.3d 816, 825 (7th Cir. 2000).

B. Analysis

1. The State of Illinois Is a Proper RICO Enterprise.

Count One charged appellants with racketeering conspiracy, in violation of 18 U.S.C. § 1962(d). R110:Ct1,¶8(JA240). It alleged that the defendants, acting through Ryan's governmental offices, used the State of Illinois as the "enterprise" for their illegal activity. R110:Ct1,¶¶1,2,5,8(JA228,233,239,240). Although the statute defines "enterprise" to include "any legal entity" (18 U.S.C. § 1961(4)), Ryan argues that states cannot be enterprises for purposes of the RICO statute. Br56-58. Ryan's argument

overlooks well-established authority, in this Circuit and others, holding "enterprise" is broadly construed to include governmental and public entities.

More than twenty-five years ago, in *United States v. Grzywacz,* 603 F.2d 682, 685-87 (7th Cir. 1979), this Court held that a public entity (in that case, the Madison, Illinois police department) could be charged as the "enterprise" for racketeering activity. This Court has reaffirmed that the racketeering statute should be construed broadly and that public and governmental entities may be charged as "enterprises." *United States v. Hocking*, 860 F.2d 769, 778 (7th Cir. 1988) (state Department of Treasury), *overruled on other grounds*, *United States v. Levy*, 955 F.2d 1098, 1103n.5 (7th Cir. 1992); *United States v. Conn*, 769 F.2d 420, 424-25 (7th Cir. 1985) (Cook County Circuit Court); *United States v. Kovic*, 684 F.2d 512, 516 (7th Cir. 1982) (Chicago Police Department); *United States v. Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1316-19 (7th Cir. 1981) (Sheriff's Office of Madison County, Illinois). *See also United States v. Genova*, 187 F. Supp. 2d 1015, 1028-29 (N.D. Ill. 2002) (Calumet City), *rev'd on other grounds*, 333 F.3d 750 (7th Cir. 2003); *United States v. Lobue,* 751 F.Supp. 748, 755 (N.D. Ill. 1990) (Chicago Heights). This Court's interpretation of "enterprise" as including public and governmental entities is consistent with that of other circuits. *Lee Stoller Enterprises,* 652 F.2d at 1318n.9 (collecting cases). *See also United States v. Turkette*, 452 U.S. 576, 580 (1981) ("[t]here is no restriction upon the associations embraced by the definition" of "enterprise").

Faced with this overwhelming precedent, appellants rely on *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976), a district court decision pre-dating virtually all of the circuit court decisions on the issue. Br57. In *Mandel*, the court concluded that the State of Maryland could not be a valid enterprise. *Id.* at 1022. But *Mandel* did not differentiate between the naming of sovereign States and the naming of any other public entities as enterprises; by its reasoning, no public entities could be "enterprises"under the racketeering statute.

Mandel has been discredited by all courts that have considered the issue, including the Fourth Circuit, which includes the District of Maryland. *See United States v. Angelilli*, 660 F.2d 23, 33 n.10 (2d Cir. 1981); *United States v. Long*, 651 F.2d 239, 241 (4th Cir.1981); *United States v. Clark*, 646 F.2d 1259, 1261-67 (8th Cir. 1981).

In arguing that states may not be considered "legal entities" under the racketeering statute, appellants miscast a straightforward issue of statutory interpretation into an issue of federalism. Br58. Their reliance on cases dealing with federalism or state sovereignty, such as *Alden v. Maine,* 527 U.S. 706, 748 (1999), is misplaced. Nothing in RICO precludes the states from addressing corruption or infringes in any way on the legitimate functioning of state government or on its sovereignty.

Appellants overlook the fundamental principle that the racketeering enterprise, whether it be a legitimate business, governmental entity or association in fact, is merely the vehicle through which defendants conduct alleged racketeering activities.

See United States v. McDade, 28 F.3d 283, 296 (3d Cir.1995) (proper to charge Congressional committee as enterprise, since "major purpose of the RICO statute was to protect *legitimate* enterprises by attacking and removing those who had infiltrated them for unlawful purposes") (citations omitted). To define a governmental unit as an enterprise does not impugn its employees or subjects, nor disadvantage the entity.

Ryan argues that Congress did not intend for sovereign states to be enterprises because RICO authorizes statutory remedies like "dissolution or reorganization." Br57. That argument was rejected by this Court in *Grzywacz*, 603 F.2d at 685-86, and further repudiated by the Supreme Court in *Turkette*, 452 U.S. at 585, which noted:

> Even if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept. Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions.

The statute does not mandate the imposition of any particular remedy, but rather, depending on the situation, offers an array of possible remedies. Governmental units may be enterprises under the RICO statute. The indictment properly charged the State of Illinois as being the racketeering enterprise used by the defendants.

2. The District Court Did Not Direct a Verdict for the Government on the Enterprise Element.

The jury instructions on the RICO conspiracy charge, viewed as a whole, treated the issues fairly and accurately. *See United States v. Ramsey*, 406 F.3d 426, 431 (7th Cir. 2005). The instructions tracked this Court's Pattern Instructions and those approved in *United States v. Neapolitan*, 791 F.2d 489, 504 (7th Cir.1986), *overruled*

on other grounds, United States v. Rogers, 89 F.3d 1326, 1336 (7th Cir. 1996), and *United States v. Campione,* 942 F.2d 429, 437 (7th Cir. 1991). The instructions explained the elements of RICO conspiracy and accurately defined "enterprise," "pattern of racketeering activity," and "interstate commerce."

Ryan complains that the district court "erroneously directed a verdict for the prosecution by essentially instructing that the state of Illinois was the RICO enterprise." Br59. This is false. The district court tracked the language of § 1961(4), instructing the jury that an "enterprise" includes "any corporation, association, or other legal entity." Tr23885. The district court instructed the jury that "[a] state is a legal entity," *id.*, the instruction to which Ryan takes exception. That instruction, though, did not direct a verdict. The jury instructions defined all elements of racketeering conspiracy and required the government to prove them beyond a reasonable doubt.[33] Tr23882.

A court may define legal terms or concepts as part of jury instructions without violating a defendant's right to have all elements of the offense determined by the jury. *See United States v. Lee,* 439 F.3d 381, 388 (7th Cir. 2006); *United States v. Bravo-*

[33]Appellants complain that the indictment improperly transformed multiple enterprises into a single overarching enterprise conspiracy. Br59. Addressing this concern, the district court instructed the jury that "[p]roof of several separate or independent conspiracies will not establish the single conspiracy . . . unless one of the several conspiracies which is proved is included within the single (charged) conspiracy." Tr23884. Moreover, "[i]t is well settled that, even if the evidence presented at trial arguably established multiple conspiracies, there is no material variance from an indictment charging a single conspiracy if a reasonable juror could have found beyond a reasonable doubt the single conspiracy charged in the indictment." *See United States v. Quintanilla*, 2 F.3d 1469, 1481 (7th Cir. 1993).

Muzquiz, 412 F.3d 1052, 1055-56 (9th Cir.2005); *United States v. Cannon,* 88 F.3d 1495, 1508-09 (8th Cir. 1996)*; Hocking*, 860 F.2d at 778. In stating that a state is a "legal entity," the district court merely advised the jury that a state thus *could* be an enterprise under the racketeering statute. It was properly left for the jury to determine whether the government had met its burden on all elements of the racketeering conspiracy. The district court did not err in its instructions to the jury.

V. The Mail Fraud Statute is Not Unconstitutionally Vague and the District Court Properly Instructed the Jury on the Elements of Honest Services Mail Fraud.

A. Standard of Review

"The constitutionality of a federal statute is an issue of law subject to de novo review." *United States v. Hausman*, 345 F.3d 952, 958 (7th Cir. 2003). The language of a proposed jury instruction is reviewed for abuse of discretion. *Irorere,* 228 F.3d at 825.

B. Analysis

1. The Mail Fraud Statute is Not Void for Vagueness.

This Court has already rejected the claim, advanced by appellants, that the mail fraud statute, as applied to an intangible-rights theory, is void for vagueness. *Hausman*, 345 F.3d at 958. The argument has also been rejected by various other Circuit Courts. *See United States v. Frega*, 179 F.3d 793, 803 (9th Cir. 1999); *United States v. Frost*, 125 F.3d 346, 370-71 (6th Cir. 1997); *United States v. Gray*, 96 F.3d 769, 772, 776-77 (5th Cir. 1996).

2. The District Court Properly Instructed the Jury on the Elements of Honest Services Mail Fraud.

The defendants suggest that the district court instructed the jury inconsistently with this Court's ruling in *United States v. Bloom*, 149 F.3d 649, 655-57 (7th Cir. 1998), by referencing various state laws and by implying that honest services mail fraud can occur irrespective of a misuse of office. Br61. In *Bloom*, this Court held that a defendant deprives his employer of his honest services "only if he misuses his position (or the information he obtained in it) for personal gain." 149 F.3d at 656-57. In *United States v. Martin*, 195 F.3d 961, 967 (7th Cir. 1999), this Court declined to require that a public official's fiduciary duty of honest services *must* be grounded in state law. Consistent with the teaching of *Bloom* and *Martin*, the district court instructed the jury as to the Illinois law applicable to Illinois officials and cautioned that "not every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation." Tr23908, 23911. Moreover, consistent with *Bloom* and *Martin,* the court made it clear that a public official had to misuse his position for himself or another; going beyond *Bloom*, the instructions required a nexus between the action taken and the benefit received. Tr24841-42(JA599-600).

Contrary to Ryan's argument (Br61), the court's instruction on conflict of interest, Tr22840-41(JA599), did not "stray" from this Court's holdings. *Hausmann*, 345 F.3d at 955-56 (citing *United States v. Bloom*, 149 F.3d 649, 655-56 (7th Cir. 1998)). If a public official conceals or knowingly fails to disclose a material personal or financial interest in a matter over which he has decision-making power, then that

official is subject to prosecution under the mail fraud statute, if the other elements of the offense are met. *United States v. Dial*, 757 F.2d 163, 168 (7th Cir. 1985); *United States v. Keane*, 522 F.2d 534, 545-46 (7th Cir. 1975); *United States v. Antico*, 275 F.3d 245, 264 (3d Cir. 2001); *United States v. Woodward*, 149 F.3d 46, 55 (1st Cir. 1998); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997). Here, Ryan's affirmative steps to steer contracts and leases and obtain undisclosed profits therefrom deprived the public of his honest services. *Cf. Hausmann*, 345 F.3d at 956 (employee's derivation of profits from business transacted on employer's behalf).

The court did not suggest that a violation of state law was either sufficient or necessary to convict for honest services mail fraud, nor did it undermine *Bloom* in instructing on conflicts of interest. As a whole, the instructions accurately stated the law on honest services mail fraud.

VI. Joinder of Defendants Was Proper and Did Not Deprive Warner of a Fair Trial.

A. Standard of Review

Claims of misjoinder are reviewed *de novo*. *United States v. Lanas*, 324 F.3d 894, 899 (7th Cir. 2003). Denial of severance is reviewed for abuse of discretion. *United States v. Olson*, 450 F.3d 655, 677 (7th Cir. 2006).

B. Analysis

1. Joinder

Fed. R. Crim. P. 8(b) allows joinder of defendants in an indictment where "they are alleged to have participated in the same act or transaction, or in the same series

of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count." Rule 8(b) is "designed to promote economy and efficiency" so long as there is no "substantial prejudice to the right of the defendants to a fair trial." *Zafiro v. United States*, 506 U.S. 534, 540 (1993) (citation omitted). Assessing whether joinder of defendants is proper, the court looks solely to the indictment. *Lanas*, 324 F.3d at 899.

Joinder of appellants was clearly appropriate under Rule 8(b). They both were charged in the RICO conspiracy, which "virtually by definition, . . . constitute[s] a 'series of acts or transactions' sufficiently intertwined to permit a joint trial of all defendants." *United States v. Bagaric*, 706 F.2d 42, 69 (2d Cir. 1983). Further, both were named in the mail fraud scheme described in Count Two, which is listed in Count One as a racketeering act and a means and method of the RICO conspiracy. R110:Ct1, ¶¶8(A),9(JA240,241). The next nine mail fraud counts relate to acts alleged as part of the fraud scheme. Since all defendants need not be charged in each count, the omission of Warner from Counts Six and Ten, two mailings in furtherance of the fraud scheme, does not undermine joinder of the defendants.[34]

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[34]Warner claims the transactions underlying Counts Six and Ten, South Holland and Grayville, were "not part of Warner's agreement," and he makes much of the district court's use of language from Rule 8(a), and not 8(b), in discussing these counts. Br65. His argument is for naught. The mailings charged in these counts, and the underlying transactions, are part of the fraud scheme in which Warner is charged (R110:Ct1,¶¶89-97,102-107(JA268-70,271-73)); thus, these counts are consistent with proper joinder of the defendants under Rule 8(b).

The same is true of Counts Eleven, Twelve and Thirteen, which charge Ryan with false statements to the FBI. The false statements are part of the mail fraud scheme (R110:Ct2,¶148(JA284)) and encompassed in the means and methods of the RICO conspiracy (R110:Ct1,¶17(JA242-43)), both offenses in which Warner was charged. As such, the inclusion of the false statement counts in the indictment did not affect the proper joinder of the defendants. *See United States v. Curry*, 977 F.2d 1042, 1050 (7th Cir. 1992) ("perjury counts may be considered part of the same series of acts or transactions as the underlying conduct which was misrepresented"); *United States v. Leiva*, 959 F.2d 637, 641-42 (7th Cir. 1992).

Counts Nineteen through Twenty-Two charge Ryan with filing false tax returns, which acts are included as part of Ryan's scheme to obstruct the IRS (Count Eighteen). This Court has recognized the proper joinder of a tax count against one defendant in a multi-defendant trial where the tax violation was based on unreported income from crimes named in other counts that include other defendants. *United States v. Anderson*, 809 F.2d 1281, 1288 (7th Cir.1987); *see United States v. Shelton*, 669 F.2d 446 (7th Cir. 1982). Such is the case here. Thus, joinder of Ryan and Warner is not undermined by the tax counts.

2. Fed. R. Crim. P. 14(a)

Rule 14(a) provides that if joinder of offenses or defendants in an indictment prejudices a defendant, "the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." There is a preference for joint trials because such trials promote efficiency, *Zafiro*, 506 U.S. at

537, and "Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion. . . . [M]easures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id*. at 538-39.

Warner claims he was prejudiced by evidence regarding events unrelated to him, including diversion of SOS resources, quashing of an IG investigation into a highly publicized accident, and the South Holland lease. Br63-64,68. But the events he cites were charged as part of the RICO conspiracy and/or the mail fraud scheme, both offenses in which Warner was charged. In an over-abundance of caution, the court gave limiting instructions regarding evidence of these events, but the evidence was actually admissible against Warner.[35] The district court acknowledged:

> In both mail fraud and conspiracy cases, evidence of one defendant's acts in furtherance of the scheme or conspiracy are admissible against any other participant in the scheme or conspiracy, even if such a participant did not specifically know what his co-defendant was doing. . . . Thus, where evidence pertaining to counts in which Ryan alone was named also dealt with the single conspiracy set out in Count One or the overarching [scheme] laid out in Counts Two through Ten, that evidence would also have been admissible against Warner even in a separate trial.

R867:48(JA48) (citing *United States v. Adeniji*, 221 F.3d 1020, 1027 (7th Cir. 1999)). Since Warner was not entitled to the limiting instructions the court gave about evidence of acts that were part of the conspiracy or scheme, he was not entitled to his proposed "summary" instruction inaccurately describing the evidence as off-limits as

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[35]Prior to and during trial, the government argued that limiting instructions were not appropriate for evidence of events charged as part of the conspiracy or fraud scheme. R257:10,14-15; Tr2957,2963.

to him. Furthermore, the bulk of the conspiracy and scheme evidence, especially Fawell and Udstuen's testimony, was very much related to Warner's activities.

As to evidence regarding the tax charges, for which appropriate limiting instructions were given, much of it pertained to acts and transactions encompassed in the mail fraud scheme (*e.g.*, Ryan's receipt of financial benefits from donors, associates, and the Gramm campaign). Evidence pertinent only to the tax charges was provided by a revenue agent, several accountants, and several witnesses who, in addition to testifying at length about transactions included in the conspiracy and the mail fraud scheme, also testified to the receipt of CFR funds by Ryan and his family. The tax evidence was minimal compared to the large amount of evidence presented on the RICO conspiracy and fraud scheme. Nothing about this evidence made it difficult for the jury to apply the limiting instructions.

Similarly, Warner's confrontation rights were protected by the limiting instruction pertaining to Ryan's statements to the FBI. Tr18099(JA934). The court excluded Ryan's statements naming Warner, except for innocuous and uncontested background information or statements not deemed inculpatory. Tr17903-05(JA922). Furthermore, the government did not introduce the statements for their truth, and, thus, under *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004), there is no confrontation issue. The jury could easily follow the limiting instructions.

Warner's argument that the jurors demonstrated an inability to follow instructions is completely baseless. The district court found that no juror who deliberated to verdict intentionally lied on a questionnaire, R867:99(JA99), or violated

instructions regarding publicity about the case, *id*., or talking about the case. R867:94(JA94). Warner's claim that jurors talked about the case before deliberations presumably refers to an alleged comment by Pavlick about a witness, which the court did not find was cause to dismiss Pavlick. (Even Ryan's counsel thought this claim unfounded.) Tr15229-31. As to the removal of juror notebooks by some jurors at the end of the trial, the court found no violation of instructions, since it did not "explicitly prohibit them from removing their notebooks at the conclusion of the trial." R807:99n33. Nor did the court find that any juror intentionally violated bans on Internet research; to the contrary, it specifically found that Peterson's search regarding jury deliberations was "an innocent mistake." 5/5/06Tr94(JA646).

Contrary to Warner's claim, adding Ryan, a noted public figure, as a defendant did not deprive Warner of a fair trial. Many cases involve defendants who are notorious in some respect (by virtue, for instance, of gang affiliation or prior acts of violence), yet this notoriety alone does not satisfy the threshold for severance. If prospective jurors had pre-conceived notions about Ryan, the *voir dire* process allowed Warner to strike those unable to set aside their feelings about Ryan in order to give Warner a fair trial.

VII. The Grand Jury Testimony of the SOS General Counsel Was Proper.

Without claiming any error or articulating any harm or prejudice, Ryan states an investigative fact: that SOS general counsel, a public official paid by taxpayers, was compelled to testify before the grand jury. Br71. *In re Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002). Ryan identifies a Circuit split on whether

government lawyers may be compelled to testify and asks the Court to "revisit its prior decision." Br71.

Ryan neglects to mention that this witness did not testify at trial. Ryan cannot articulate anything from the compulsion order or the witness's grand-jury testimony that prejudiced him. Having previously ruled on this specific matter, which was not further developed below, this Court should refuse to revisit its prior decision.

CONCLUSION

For the foregoing reasons, the Court should affirm appellants' convictions.

Respectfully submitted,

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CIRCUIT RULE 32(d) CERTIFICATION

Pursuant to Fed. R. App. P 32(a)(7)(C), I hereby certify that this brief complies with the Court's order permitting a brief of no more than 22,000 words in that it contains 21962 words. This certification is based on the word count of the word-processing system used in preparing the government's brief, specifically WordPerfect 12 for Windows.

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CERTIFICATE OF SERVICE

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